IN THE

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 497. 3

A. M. ANDERSON, Receiver of the National
Bank of Kentucky, of Louisville, - - Petitioner,

versus

KATHERINE KIRKPATRICK ABBOTT,
Administratrix, Et Al., - - - Respondents.

BRIEF FOR RESPONDENTS.

HENRY E. McELWAIN, JR.,
WILLIAM W. CRAWFORD,
RICHARD P. DIETZMAN,
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Louisville, Kentucky,
January 30, 1943.

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

SUBJECT INDEX.

TABLE OF CASES.

Statutes.

Texts.

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No. 497.

A. M. ANDERSON, RECEIVER OF THE NATIONAL BANK OF KENTUCKY, OF LOUISVILLE, - *Petitioner*,

v.

KATHERINE KIRKPATRICK ABBOTT, ADMINISTRATRIX, ET AL., - - - - *Respondents.*

BRIEF FOR RESPONDENTS.

STATEMENT.

This is a pioceeding by A. M. Anderson, Receiver of the National Bank of Kentucky, to recover for the benefit of the creditors of the Bank an assessment by the Comptroller of the Currency against the stockholders of the Bank.

The three thousand or more persons named as defendants in the Receiver's bill were those residents of the Western Judicial District of Kentucky who were stockholders of the BancoKentucky Company, a Delaware, non-banking corporation. They were sued solely because they held shares in that corporation, with-

Throughout the brief, emphasis is ours unless otherwise indicated.

out discrimination as to the manner in which they had acquired those shares. At the time of the closing of the Bank, November 17, 1930, none of them (except those who were Bank directors holding qualifying shares) were record holders of Bank shares and the great majority of them had never owned any such shares.

It was alleged, however, that they were the real owners of Bank shares because the BancoKentucky Company, in which they held stock, had acquired by purchase and retained among its assets at the time of the closing of the Bank certain "Participation Certificates" issued by the trustees in a stock-pooling agreement entered into in April, 1927, by stockholders of the National Bank of Kentucky and stockholders of The Louisville Trust Company. Seventy per cent (70%) of the value of each share in the "indivisible trust estate" created by the pooling agreement was based upon the Trustees' holdings of Bank stock and the total value of the Bank stock included in the Participation Certificates owned by the BancoKentucky Company was less than twenty-nine per cent (29%) of the value of all of the assets of that Company, as shown by its balance sheet as of September 18, 1930.*

Two years before the filing of the Receiver's bill in the instant case, the legal consequence of the holding of Participation Certificates had been judicially determined in suits brought by the Receiver of the Bank against holders of Participation Certificates, including the BancoKentucky Company, to recover from them the Comptroller's assessment against stockholders of

*Bill, Par. VIII; Defendants' Exhibit 7; Finding of Fact No. 41, I R. 262.

the Bank upon the ground that those Certificates represented Bank shares, in part, and that the holders of Certificates, though not record holders of Bank shares, were the real owners of the Bank shares represented by their Participation Certificates and were consequently liable, *pro tanto*, for the assessment.

The United States District Court for the Western District of Kentucky sustained the Receiver's claim, declaring that the holders of Participation Certificates were "the actual and real owners" of the Bank shares represented by their Certificates (*Keyes* v. *American Life & Accident Ins. Co.* and Four Other Cases, 1 F. Supp. 512, decided Aug. 17, 1932). Upon appeal by the BancoKentucky Company, the defendant in one of those cases, the United States Circuit Court of Appeals for the Sixth Circuit affirmed the judgment (for $3,772,162.40) against the BancoKentucky Company, declaring that because of its ownership of Participation Certificates, it was "in every sense the true and beneficial owner" of the Bank shares represented by those Certificates (*Laurent* v. *Anderson,* 70 Fed. (2d) 819, decided May 7, 1934).

Almost two years later (February 17, 1936) the Receiver of the Bank commenced the instant proceeding, alleging that the real owners of the Bank shares in question were—not the Trustees, who were the record holders, not the holders of Trustees' Certificates, who had been held to be the real owners in the *Laurent* case, *supra*—but were the stockholders of the BancoKentucky Company. Four years later (June 29, 1940), the United States District Court for the

Western District of Kentucky, after a trial upon the merits, dismissed the Receiver's bill in the instant case, upon the ground that none of the defendants had been shown to be the real owner of the Bank shares in question (*Anderson* v. *Abbott*, 32 F. Supp. 328). Upon appeal by the Receiver, the United States Circuit Court of Appeals for the Sixth Circuit affirmed the judgment of the District Court. It closed its opinion with the following statement (*Anderson* v. *Abbott*, 127 Fed. (2d) 703):

> "The BancoKentucky Company was a legal entity, separate and distinct from its shareholders. The record reveals no underlying purpose of those who organized it or invested in its shares to afford asylum to stockholders of a national bank, seeking escape from the rigidity of individual liability for double assessment. Banco was not a mere sham corporation, nor was it exclusively a holding company. It existed vitally as an independent corporation and not as a mere conduit for the flow of national bank stock dividends to individuals. The corporation had been held liable as the real and beneficial owner of a large majority of the capital stock of a defunct national bank.
>
> "In our judgment, the reach of double liability assessment within the true meaning of the National Banking Act does not extend beyond the BancoKentucky Company to its stockholders."

THE NATURE OF THE RECEIVER'S CLAIM.

The provision of the National Bank Act, imposing double liability upon the stockholders of national banks (U. S. C., Title 12, §63) was first adopted by the Congress in 1864 and continued in force until its repeal in 1933 (U. S. C., Title 12, §64a). During that period of seven decades, numberless cases involving the construction of that section of the Bank Act were decided by the courts of the United States and the decisions in many of these cases were brought to this Court for review. The principles governing such cases have long since been conclusively settled.

The effect of these decisions has been to establish certain categories of persons to whom this provision of the Act is applicable. They are,

(1) Record holders of national bank shares who, though not the real owners, are estopped to say that they are not;

(2) Former holders of national bank shares, who have transferred their shares within sixty days next before the date of the failure of the bank (U. S. C., Title 12, §64);

(3) Former holders who have transferred their shares with knowledge of the impending failure of the bank and with intent to evade liability (*idem*);

(4) Trustee-holders, who are liable only to the extent of the trust estates in their hands (U. S. C., Title 12, §66);

(5) Real owners who, although not registered as the holders of the bank shares in question, may be held liable upon a showing that the record holders of those shares have received them merely as the nominees or agents of the real owners, or, in the case of a holding by a corporation, that the corporation is a mere instrumentality of the real owners who have transferred their shares or caused them to be issued to the corporation, without surrendering their control of and proprietary interest in the shares.

The Receiver has never claimed that the defendants or any of them fall within categories (1), (2) or (4) above. The Receiver has never consistently claimed that the defendants fall within categories (3) or (5), but has continuously shifted from one to the other as the exigencies of his case demanded.

While ground (3) has from time to time been presented (as it is here), the averments of the bill were never sufficient to sustain that ground. The greater part of the voluminous evidence introduced by the Receiver seemed to have no other purpose than to sustain this theory. However, after the proof was all in, the Receiver, in his reply brief in the District Court, indignantly disclaimed any intention to charge that any of the defendants had transferred their Participation Certificates to the BancoKentucky Company with knowledge of the impending failure of the Bank and with intent to evade liability. Thus, in his reply brief in the District Court he said:

> "Plaintiff has not claimed that any defendant is liable for having transferred T.P.C.'s with

knowledge of the impending failure of the National Bank of Kentucky. Plaintiff has not claimed the T.P.C.-holders actually knew the condition of the Bank in 1929" (Br., p. 59).

* * * * * *

"Although it is affirmed with monotonous regularity, plaintiff has never claimed that the National Bank of Kentucky was insolvent, in any sense of the word, when Banco was organized, and much less that the organizers knew it" (Br., p. 86).

Doubtless the Receiver made this disclaimer the more willingly because of the fact that the claim, even if sustained, was sufficient to support his case only as against a part of the defendants and would have failed as against all who acquired Banco stock on the outside and never owned any Bank stock.

And so, following this disclaimer, the Receiver for a time relied upon the fifth ground above stated and so presented his case to the Circuit Court of Appeals. His brief in that court commences with the following statement:

"The essence of the case is this: It is firmly embedded in our jurisprudence that the owners of national bank stock cannot organize a commercial corporation to hold their bank stock, channel the dividends on the bank stock to themselves through the holding company, and then interpose the corporate entity as a shield against the assessment liability imposed upon 'the actual owners of the capital of a national bank, that is, those who have their money invested therein.'"

When the case was affirmed in the Circuit Court of Appeals the Receiver apparently became alarmed at the weakness of the contentions there made and at his failure to convince the Court of the similarity between this case and the case of *Barbour* v. *Thomas,* 86 Fed. (2d) 510, upon which he so confidently relied. In any event, the Receiver was unwilling to apply for Certiorari to this Court upon that ground. And thus we find the Receiver returning to his original contention —one which had been expressly disclaimed and abandoned. In his Petition for Certiorari to this Court he states the issue involved—the *only* issue—as follows (p. 9):

> "The legal question presented here is: Are the owners of an insolvent national bank relieved from individual liability, or 'double assessment,' under the then existing Federal statute because, shortly before the bank's failure, they organized a holding company and exchanged their bank shares for holding company shares?"

Doubtless the Receiver was confident that such a statement of the issue, made to this Court, would more readily induce this Court to believe that both of the courts below had committed serious error in this case. While we can understand the circumstances which forced the Receiver into this position, we wonder how he can reconcile the statement of the issue now made with his equally solemn statements of abandonment and disclaimer made to the District Judge.

The Receiver would now have this Court believe that this appeal presents the case of a bank in a dis-

tressed condition, abandoned by its stockholders who were seeking by fraudulent means to escape their obligations to its creditors. But he failed so utterly to prove this case in the District Court that he threw up his hands in despair and abandoned it clearly and finally, until revived here.

The underlying and controlling question decided by the courts below is a question of fact, that is, the question who were the real owners of the Bank shares in question. It is exactly the same question that was presented in the *Laurent* case, *supra*. In that case, the decision was that the BancoKentucky Company was the real owner of the Bank shares here in question. Upon that ground the defendants in the instant case interposed pleas of *res judicata* and election; which we shall have occasion to discuss in a later part of this brief. But the District Court decided to try *de novo* the question of real ownership and, since the Circuit Court of Appeals devoted its attention exclusively to that question, we shall open our argument with a discussion of that subject.

It presents a question of fact. In *Rankin, Receiver* v. *Fidelity Insurance Trust & Safe Deposit Co.*, 189 U. S. 242, a national bank assessment case, this Court, by Mr. Justice Brown, said (p. 252):

> "The case then really turned upon the actual ownership of the shares, and this question was properly left to the jury as one of fact."

Since petitioner's statement is very incomplete and purely argumentative, and is not in accord with the findings of fact of both courts below, we feel compelled

to give, in the following "Narrative," a chronological account of the origin and rise, the decline and fall of the BancoKentucky Company.

NARRATIVE.

Petitioner, A. M. Anderson, is Receiver of the National Bank of Kentucky, in succession to the original receiver, Paul C. Keyes, who was appointed November 17, 1930, and resigned December 15, 1932.

Respondents are stockholders of the BancoKentucky Company.

The National Bank of Kentucky was originally a State bank, organized in 1834. It became a national bank in 1900.

The Louisville Trust Company is a Kentucky corporation, organized in 1884.

The BancoKentucky Company is a Delaware corporation, organized July 16, 1929.

April, 1927 Under an agreement of April 22, 1927, the stockholders of the National Bank of Kentucky and the stockholders of the Louisville Trust Company "trusteed" their shares, that is to say, they transferred their shares in those institutions to six trustees and received from the trustees certificates of shares in the "indivisible trust estate" thus created. These certificates were called "Trustees' Participation Certificates" and are familiarly referred to, in the record, as "T.P.C.'s". Each trust share was originally of the par value of $100 but the shares were subsequently

"split," ten for one, and thereafter had a par value of $10 each.

By the terms of the agreement, the certificate-holders acknowledged their proportionate responsibility for any assessment lawfully levied against the Trustees as stockholders.

In preparation for the carrying out of this pooling agreement, the National Bank of Kentucky declared a stock dividend of 60 per cent. The Comptroller of the Currency not only approved this dividend, but congratulated the President of The Louisville Trust Company, Mr. John Stites, upon "its affiliation with this splendid bank, the National Bank of Kentucky" (R. II, pp. 49 and 218; *Atherton* v. *Anderson,* 86 Fed. (2d) 530).

In *Laurent* v. *Anderson,* 70 F. (2d) 819, the Circuit Court of Appeals for the Sixth Circuit had under consideration the effect of this trust agreement and held that, while the Trustees were the record owners of the Bank shares, the T.P.C.-owners were the real owners and consequently were liable for the assessment made by the Comptroller against Bank stockholders.

June, 1927 On June 10, 1927, the Bank declared its customary quarterly dividend of 4 per cent ($160,000) and made a report thereof to the Comptroller of the Currency (subsequently approved by the National Bank Examiner in charge), which showed,

Capital	$4,000,000.00
Surplus	2,000,000.00
Undivided profits after payment of dividend	442,738.78

1927 to 1930 Thereafter and to its closing three and a half years later, the Bank declared and paid quarterly dividends of 4 per cent ($160,000) and made reports thereof to the Comptroller (never criticized by him), showing on each of the dividend dates given below a capital of $4,000,000, a surplus of $2,000,000 and undivided profits, after deducting required charge-offs and payment of dividend, in the following amounts (Defendants' Exhibit No. 2):

September 2, 1927:	Undivided	profits:	$287,343.59
December 9, 1927:	"	"	321,307.09
March 16, 1928:	"	"	318,505.85
June 15, 1928:	"	"	261,476.64
September 14, 1928:	"	"	234,903.36
December 14, 1928:	"	"	213,384.72
March 16, 1929:	"	"	250,915.51
June 14, 1929:	"	"	188,815.34
August 2, 1929:	"	"	82,766.18
December 13, 1929:	"	"	134,787.53
March 14, 1930:	"	"	198,613.16
June 30, 1930:	"	"	166,835.00
September 19, 1930:	"	"	117,616.80

During this time each director of the Bank held his qualifying shares by purchase for value but subject to an agreement to transfer them to the Trustees in exchange for T.P.C.'s in the event of his death, retirement or insolvency. He received for his own use all dividends on those shares (Findings of Fact Nos. 5 and 8, R. I, pp. 244-5).

July, 1929 On July 16, 1929, the BancoKentucky Company, a non-banking corporation, was incorporated in

Delaware. It is known in the record as "Banco" and we shall use that convenient abbreviation.

The purposes for which this corporation was organized, as stated in its certificate of incorporation, were very numerous and the powers granted to it were correspondingly wide in their scope. They included the buying and selling of corporate securities, the financing, management or operation of commercial, manufacturing, financial or other enterprises, the underwriting of security issues for compensation, the acquisition of corporate securities by purchase, the issuance of its own securities, the guarantee of obligations of other persons, firms or corporations and, generally, all the powers conferred upon such corporations by the General Corporation Law of the State of Delaware. Of course, the company was not authorized to engage in banking and never attempted to do so.

The certificate of incorporation ("Eighth" article) provided that "the private property of the stockholders [should] not be subject to the payment of corporate debts to any extent whatever."*

Each stock certificate issued by Banco described the shares represented by it as being "full-paid and non-assessable."

For some months prior to the incorporation of Banco the organization of such a corporation had been under consideration by a group of T. P. C.-holders, many of whom were also officers or directors of the

*In Delaware the "official form" of a certificate of incorporation provides ("Seventh" article) that "the private property of the stockholders shall not be subject to the payment of corporate debts to any extent whatever." See Fletcher, Corporation Forms Annotated (third edition), Vol. 1, §215, p. 301.

Bank or of the Trust Company. On July 19, 1929, at the first meeting of the Board of Directors of Banco, July, 1929 the publication of an announcement of its organization and purposes was authorized. The announcement is copied in full, not only in the minutes of that meeting (Plaintiff's Exhibit 23), but also in the findings of fact made by Judge Swinford of the District Court (R. I, pp. 251-5). It is frequently referred to in the Record as the "Prospectus."

After stating generally the advantages to the Bank and the Trust Company of an alliance with an institution of large resources, which could

> "take advantage of many sound and profitable financial opportunities frequently presented in the course of business of the two banks, but not available to them because of the restrictions upon their power and activities,"

the Prospectus explained the part which stockholders of the Bank and of the Trust Company (that is, T.P.C.-holders) were invited to take in financing the new company. Its charter authorized the issue of 2,000,000 shares, of the par value of $10 each, which, it was announced, were to be sold or exchanged on the basis of $25 per share. An offer was made on behalf of the new company, good until September 19, 1929, to exchange two of its shares for each Trustees' Participation share offered for exchange within that time and, in addition, to give the person making such an exchange the right to subscribe for additional shares of Banco at the price of $25 per share. If all of the au-

thorized shares were disposed of in this manner, the new company would have a capital of $20,000,000 and a surplus of $30,000,000.

The offer was made upon the double condition that, as the result of such exchanges and subscriptions, T.P.C.-holders should acquire at least a majority of Banco shares and Banco should acquire at least a majority of T.P.C. shares, outstanding as of September 19, 1929. The Prospectus closed with a recommendation that the holders of T.P.C.'s avail themselves of the offer thus made, both as to the exchange of their trust shares for Banco shares and the exercise of their right to subscribe to additional Banco shares.

Before this announcement was put out, Robert F. Vaughan, a Louisville lawyer of high standing and a director of the Louisville Trust Company, was asked for an opinion on the question whether or not any taxable gain would result from the exchange of T.P.C. shares for Banco shares. Mr. Vaughan, on behalf of the Trustees, conferred with his associates, Messrs. Miller and Chevalier, well-known tax consultants
July, 1929 of Washington, D. C., and on July 6, 1929, advised that, if the organization set up by the Trust Agreement of April 22, 1927, could be treated "as an association or corporation for income tax purposes," and if the pending plan required that, as a result of the exchanges of the shares of that "association" (*i. e.,* T.P.C. shares) for Banco shares, Banco should acquire at least a majority of T.P.C. shares, then the transaction would be

treated as a "reorganization," in the sense in which that word is used in the Revenue Act, and any gain apparently involved in those exchanges would not be "recognized" for income tax purposes until actually realized by a sale of the Banco shares thus acquired.

Through Miller and Chevalier, an "information ruling" (Plaintiff's Exhibit 134-1) was obtained from the Treasury Department to the effect that the organization created by the Trust Agreement of April 22, 1927, was "in a *quasi* corporate form" and was "an association within the meaning of the several Revenue Acts."

The original draft of the Prospectus had said nothing about a "reorganization" or about the necessity of securing a majority of T.P.C. shares in exchange for Banco shares (R. III, p. 5). It was as a result of Mr. Vaughan's advice, based upon the ruling of the Treasury Department, that the Prospectus was revised so as to describe the plan as a "reorganization" and to provide that it should become effective only if a majority of T.P.C. shares were acquired by Banco (*idem*).

Following the sending out of the Prospectus, the exchanges were so prompt and so numerous that the number of Banco shares left for sale was thought to be too small to produce the cash resources which had been anticipated and which were thought necessary to the accomplishment of the purposes for which the new company had been organized. Consequently, the charter of Banco was later amended so as to authorize the issuance of 3,000,000 additional shares.

In the end, substantially all outstanding T.P.C. shares (540,484 out of 570,550) were exchanged for 1,080,968 Banco shares (R. I, p. 256; II, p. 94). In July, August and September, 1929, T.P.C. shares were selling on the Louisville Stock Exchange at prices ranging from 44½ to 47 per share (par $10). On October 2, 1929, interim receipts for T.P.C.'s deposited for exchange sold at 50¼ per share (Defts.' Exh. 1). At the latter figure, the actual exchanges of T.P.C. shares for Banco shares gave the new company an invested capital of more than $27,000,000 from this source alone.

July-October, 1929

In addition, $9,869,650 in cash was realized from the sale of 394,786 Banco shares at $25 per share (R. I, p. 256). Included in these cash sales were 178,878 shares purchased for $4,471,950 by T.P.C.-holders, whose maximum double liability upon the T.P.C. shares surrendered by them for exchange had been $1,437,620 (*id.*). The directors of the Bank and of the Trust Company, whose combined, maximum liability upon their surrendered T.P.C. shares in the event of the failure of both the Bank and the Trust Company, would have been $761,150, subscribed for 47,188 additional Banco shares, for which they paid $1,179,750 in cash (*id.*).

Within six months after the closing date for the exchange of shares (September 19, 1929), Banco acquired a major stockholding interest in each of four Kentucky banks and two Cincinnati banks, and a holding of 32 per cent of the outstanding shares of the Peoples-Liberty Bank and Trust Company, of Covington, Kentucky (R. II, p. 96), at

October, 1929, to April, 1930

a total price of $11,500,020 of which $6,561,545 was paid in cash and $4,938,475 by the issue of 197,539 Banco shares at $25 per share (R. II, pp. 95-96). It thus appears that, during this period, in addition to the exchanges and cash purchases made by T.P.C.-holders, 413,447 Banco shares had been acquired, at the price of $10,336,175 by outsiders who had not been holders of Bank or Trust Company stock. Whereas there had been 2,225 T.P.C.-holders, there were now (April 1, 1930), 5,717 holders of Banco shares.*

The sale of Banco shares was not confined to sales to T.P.C.-holders. Subscription to its shares was open to the public. In fact, little more than 45 per cent. of the cash sales were made to T.P.C.-holders. Of the $9,869,650 in cash realized from such sales, $5,397,700 was contributed by outsiders. Of the cash so realized, $3,308,150 was never invested in bank shares.

It was in this early stage of Banco's life that the collapse of the stock market occurred (October 29, 1929). As to the effect of this collapse of the market, this Court has said:[1]

> "Judicial notice must be taken of the fact that late in 1929 there occurred a great collapse of values of all classes of property—railroads, other utilities, commodities and securities, and that the depression then commenced progressively became greater."

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*The foregoing calculations are based upon facts, found by the District Court (R. I, pp. 255-257), as to which there has been no dispute, and upon admissions made by defendants at plaintiff's request (R. II, pp. 94-96, Pars. 92, 94 and 96 to 100, inclusive).

[1] *Great Northern Ry. v. Weeks*, 297 U. S. 135, at p. 149.

Banco, however, went ahead with the increase
Spring, 1930 of its authorized capital stock (January, 1930) and, with the partial recovery of the market in the spring of 1930, thought the time opportune for a larger participation in the "many sound and profitable financial opportunities" mentioned in the Prospectus, which "were not available to [the two banks] because of the restrictions upon their power and activities."

April, 1930 Caldwell and Company, of Nashville, Tennessee, had for some years been engaged in "a general investment banking business" and, as the District Court found, was generally regarded as the largest and strongest investment house in the South:

> "In 1926 Caldwell and Company had sold and distributed about $30,000,000 in securities, and from then on, to and including 1929, its distribution had increased to where it sold and distributed $75,000,000 in securities in 1929, and for the first five months of 1930 its sales and distributions were around $37,000,000" (Findings of Fact, R. I, p. 258).

On April 15, 1930, the Board of Directors of Banco, relying upon Caldwell's guarantee that the net worth of the Caldwell Company was not less than $9,000,000, authorized the acquisition by Banco of half of the capital stock of Caldwell and Company. On May 29th a contract for the exchange of 900,000 shares of Banco for one-half of Caldwell and Company's 20,000 shares, having a book value of $450 per share, was approved. It was, however, provided that 200,000 of the 900,000 Banco shares to be received by Caldwell and Company

should be held in escrow until Caldwell's assets were appraised.

June, 1930 On June 2, 1930, President Brown, of Banco, gave to the press a statement as to this transaction, saying that the "consummation" of these negotiations created

> "what is by far the largest and most important financial structure ever built in the middle western or southern States and one that will undoubtedly stand out in the future as one of America's greatest financial institutions."

At the time when this deal was closed, bank stocks held by Caldwell and Company were less than ten per cent of its total investment in securities (R. II, p. 301; Donovan).

Of the 900,000 Banco shares issued to Caldwell and Company, 700,000 were actually delivered, 200,000 shares being held in escrow, as explained above. The 10,000 shares of Caldwell and Company were delivered to Banco and appeared upon the balance sheet of that Company. The appraisal of the Caldwell assets, upon which the exact number of escrowed Banco shares to be delivered to Caldwell was to depend, was postponed at the request of Caldwell and, in the end, was not made at all.

The 10,000 Caldwell shares thus acquired by Banco were carried on its books as an asset of the Company (R. I, pp. 256-262).

November, 1930 On November 5, 1930, the *Courier-Journal* of Louisville carried a Nashville dispatch to the following effect:

"A committee of the Nashville Clearing House, after an investigation of the affairs of Caldwell and Company, investment bankers, issued the following statement today:

" 'Rumors have become current regarding the affairs of Caldwell and Company. On account of the size and standing of Caldwell and Company, the company met with officers of the banks of Nashville who are members of the Clearing House. From statements made, we believe that Caldwell and Company is solvent and with co-operation its affairs will be worked out so that the interests of all will be conserved and protected. Its books show a large net worth; but on account of the very unusual financial condition of the entire country, its securities are difficult to dispose of at this time at a fair price.

" 'The affairs of Caldwell and Company have been placed in our hands as a committee for the purpose of conserving and protecting the interest of that institution and all concerned and we ask and invite the co-operation of all interested and believe that with same none will suffer.' "

On November 6, 1930, there was published in the *Courier-Journal* of Louisville the following statement from President Brown, of Banco:

"Negotiations which have been in progress for several months between the BancoKentucky Company and Caldwell and Company have never been consummated. The BancoKentucky Company is, therefore, not connected in any way with the affairs of Caldwell and Company."

In the same issue of that paper, on the same page and in the same column (Plaintiff's Ex. No. 26, pp. 1214-23), President Brown's conflicting statement of June 2, 1930 (*supra*, p. 20), was reproduced. In the interval between this simultaneous publication of these two inconsistent statements from President Brown and the closing of the Bank on Monday, November 17, 1930 (a period of nine business days), the Bank lost $12,000,000 in deposits (R. I, p. 264).

On November 17, 1930, the Comptroller of the Currency placed the Bank in the hands of Paul C. Keyes, as Receiver.

On the same day (November 17, 1930), the Louisville Trust Company failed to open its doors and the Fidelity and Columbia Trust Company, of Louisville, was appointed receiver by the Jefferson Circuit Court.

At the closing of the Bank, stockholders of Banco had net deposits in the Bank of $1,254,783.27 and deposits in the Trust Company of $858,093.71, or a total in both of $2,112,876.98 (R. I, p. 266; Finding 60).

On November 24, 1930, Banco was placed in the hands of Joseph S. Laurent, as Receiver, by the Jefferson Circuit Court.

On September 19, 1930, the Bank had declared the last of its quarterly dividends mentioned above (payable October 1st), leaving intact its capital and surplus of $6,000,000 and undivided profits, after payment of the dividend, of $117,616.80.

September-October, 1930

On September 17, 1930, Chief National Bank Examiner Neill had commenced an examination of the Bank and on October 24, 1930, had made

a report, covering the half-year in which the June and September dividends of that year were declared and paid. In his report (Ex. 20, pp. 875-991), as well as in prior conferences with the officers of the Bank (R. I, pp. 142, *et seq.*), he had severely criticized some of the larger loans and investments of the Bank and had pointed out certain items, described as "estimated losses" and amounting to $1,357,654.74, as to which, if not otherwise eliminated, he thought a charge-off "would be in order," thus necessitating "reduction in the surplus account of the Bank" (Ex. 20, p. 979). He had not only approved the June dividend (*idem*, p. 972) but had made no mention whatever of the September dividend, although he had learned on September 25th of its declaration, which was six days before it was payable and thirty days before the closing of his examination on October 24th (R. II, p. 154). The inconsistency between his failure to criticize this dividend at the time of its declaration and his subsequent testimony in the instant case that "from [his] point of view the [September] dividend was paid with known losses and was illegal" (R. II, p. 158) he has attempted to explain as follows:

> "I did not approve this dividend payment. I made no mention in the report of examination of this particular report of earnings but I did not formally criticise it. I did criticize the dividend policy in my report at page 11-6 where I said: '* * * As a matter of conserving earnings to provide for losses, a reduction of the present dividend rate of 16 per cent per annum should be given serious consideration by the board of directors.' "

February, 1931 On February 20, 1931, the Comptroller of the Currency levied a one hundred per cent assessment against the stockholders of the Bank.

March, 1931 On March 20, 1931, Keyes, as the Receiver of the Bank, mailed to the stockholders of Banco a letter, informing them that he had made a demand upon Banco for the payment of the assessment, upon the ground that the T.P.C.'s held by Banco really represented Bank shares, and advising the addressees that, if he did not succeed in collecting from Banco, he intended

> "to proceed against [them] for the collection of the aforesaid assessment liability represented by the said trustees' participation certificates held by said BancoKentucky Company" (R. I., p. 70).

March, 1931 On March 25, 1931, four months after the closing of the Bank, the Receiver of the Bank paid to its depositors a dividend of 67 per cent, on Receiver's certificates aggregating about $27,000,000.

On March 31, 1931, Keyes, as Receiver of the Bank filed an action in the United States District Court for the Western District of Kentucky against the directors of the Bank, in which he sought to recover damages, in a sum exceeding $14,000,000, for losses alleged to have resulted either from negligence in the management of the Bank or from violations of the National Banking Act on the part of the directors. Among other things, it was alleged that loans made by the Bank upon the security, in whole or in part, of Banco shares, constituted violations of that provision

Keyes v. Akers

of the Act which forbids a national bank to make loans on the security of its own stock (U. S. Code, Title 12, Sec. 83); since Banco stock (it was alleged) was really Bank stock.

March, 1933 The cause was referred to a master, who recommended a decree, as to non-officer directors, exonerating them from the charge of common law negligence, as well as the charge of violation of the section of the Act, cited above, but holding them liable on other grounds in the sum of $517,910.

July, 1934 Upon exceptions to the Master's report, the District Court on July 7, 1934, held these directors liable for violations of the Act, in sums ranging from $86,000 to $3,900,000. As to loans secured, in whole or in part, by pledges of Banco shares, it was held that they were made in violation of the statutory prohibition of loans by the Bank on its own shares and recoveries, on this ground, were awarded against twenty-six, non-officer directors in sums ranging from $1,549,907 to $1,636,673.

As to all claims of the Receiver, not recognized in the above recoveries, including the claims based upon common law negligence, the bill was dismissed (*Anderson* v. *Akers,* 7 Fed. Supp. 924).

November, 1936 Upon appeal, the United States Circuit Court of Appeals for the Sixth Circuit, on November 11, 1936, reversed the judgment of the District Court, except as to one item included in the recovery awarded below. The view of the District Court that Banco stock

Atherton v. Anderson

was really Bank stock and that consequently loans by the Bank on the security of Banco shares were, in fact, loans on the security of its own shares was expressly rejected and the decree was reversed "in so far as it awards damages against any of the appellants for losses suffered in the bank in consequence of loans on shares of the BancoKentucky Company" (*Atherton* v. *Anderson,* 86 Fed. (2d) 537).

This case came a second time before the United States Circuit Court of Appeals for the Sixth Circuit, having been remanded by the Supreme Court of the

November, 1938

United States for a determination of the question whether there was such a showing of common law liability for negligence as would support the decree of the District Court. The former ruling of the Circuit Court of Appeals that loans on the security of Banco shares did not offend against the statutory prohibition of loans by a national bank on its own stock was not involved on this second hearing and was allowed to stand and it was further adjudged that there was no negligence shown in the making of these loans (99 Fed. (2d) 895).

After a hearing on the question of negligence, which resulted in a decision favorable to the Receiver, the Circuit Court of Appeals remanded the case to the District Court, with directions to enter a decree consistent with the opinion.

December, 1938

On December 28, 1938, the District Court entered a decree, which disposed of the Receiver's claim of liability for making loans on Banco shares in the following paragraph:

"It is adjudged that none of the non-officer directors of the National Bank of Kentucky of Louisville are liable to the plaintiff, under Section [83] of Chapter 2 of the title, 'Banks and Banking,' of the United States Code, or on common law principles of negligence for the losses sustained by the Bank on account of moneys supplied on loans collateraled, in whole or in part, by stock of the BancoKentucky Company and set out in Paragraph 45 of the original decree herein."

October, 1931

Meanwhile, on October 31, 1931, Keyes, as Receiver of the Bank, had filed in the United States District Court for the Western District of Kentucky a petition against Laurent, as Receiver of Banco, praying judgment for $3,772,162.40, being the amount of the Comptroller's assessment against Bank shares represented by the T.P.C's held by Banco. At or about the same time, Keyes brought similar actions against four other T.P.C.-holders, namely, Hattie B. Speed, Jennie L. Robins, Harvey L. Graybill, and the American Life & Accident Insurance Company. The five cases were ordered to be heard together and the opinion of the District Court in these cases is reported under the style of "*Keyes* v. *American Life & Accident Ins. Co., and four other cases*" (1 F. Supp. 512).

Laurent v. Anderson

August, 1932

On August 17, 1932, Judge Cochran, of the District Court, held, in accord with the contention of the Receiver, that Banco and the four other T.P.C.-holders, mentioned above, were liable upon the ground that, because of their ownership of T.P.C.'s, they

were "the actual and real owners" of Bank shares. The opinion of the Circuit Court of Appeals for the Sixth Circuit, on appeal by the Receiver of Banco, is reported under the style, *"Laurent* v. *Anderson"* (70 Fed. (2d) 819), Anderson having meanwhile succeeded Keyes as Receiver of the Bank.

May, 1934 Upon that appeal the Circuit Court of Appeals, on May 7, 1934, affirmed Judge Cochran's judgment, declaring that T.P.C.-holders were "in every sense the true and beneficial owners" of the shares of the Bank.

June, 1933 [On June 16, 1933, Congress repealed that section of the National Banking Act (U. S. C., Title 12, Sec. 64) which imposed double liability on stockholders of national banks, effective as of July 1, 1937.]

February, 1936 On February 17, 1936, which was five years (lacking three days) after the levy of the assessment by the Comptroller of the Currency, A. M. Anderson, Receiver of the National Bank of Kentucky, commenced this action against the stockholders of Banco.

July, 1938 On July 12, 1938, the District Court overruled defendants' motion to dismiss the bill and their motion, under Equity Rule 29, to hear and determine, before trial, the question of the legal validity of Paragraphs II and III of the answer of David J. Abbott, Paragraphs II and III of the answer of the Fidelity and Columbia Trust Company, Executor of the will of Mary E. Reed, deceased, and Paragraphs II, III and

IV of the answer of G. A. Heuser, Executor of the will of Henry Vogt, deceased.

These paragraphs contained pleas of election, estoppel by judgment and *res adjudicata,* based upon the rulings of the Circuit Court of Appeals in *Laurent* v. *Anderson, supra,* and *Atherton* v. *Anderson, supra.* The District Court not only ruled that the facts alleged in these paragraphs were insufficient in law to constitute a defense, but ordered the paragraphs stricken from the pleadings. Subsequently, however, the answer of Heuser, as Executor of the will of Vogt, was allowed to be refiled in its entirety (R. I, p. 117) and the substituted answer of Katherine Kirkpatrick Abbot, Administratrix of the estate of David J. Abbott, deceased, in which the same defenses were pleaded, was ordered filed (R. I, p. 87). By virtue of an order of the District Court, entered October 31, 1938, these answers inured to the benefit of all defendants in so far as they stated matters of defense which were available to them (R. I, p. 173).

October, 1938, to February, 1939 The hearing of the case upon the merits commenced October 31, 1938, and the introduction of evidence was completed on February 3, 1939.

On February 3, 1939, after defendants had introduced as witnesses ten Banco stockholders (R. II, pp. 205-306; R. III, pp. 1-189), and after it had been stipulated that, if called, the testimony of other named stockholders would be substantially similar to the testimony theretofore given by certain other witnesses for defendants (R. III, pp. 290-292), the District Court, on its own motion, ordered to be read in evi-

dence for defendants the following finding of the Court (R. I, p. 174):

"On the Court's own motion, it is considered, ordered, adjudged and found that each of the defendants herein, save and except those who were officers, directors or employees of the National Bank of Kentucky and Louisville Trust Company, or officers or directors of BancoKentucky Company, if called as a witness in his own behalf, would testify, over plaintiff's objections, that each of them acquired their respective shares of stock in BancoKentucky Company, believing, as distinguished from whatever constructive knowledge may be imputed to them as a matter of law, that the Louisville Trust Company and the National Bank of Kentucky were both solvent and sound financial institutions, and that they did not even remotely suspect that either of said banking institutions were in a questionable financial condition, if such they were, and that they acquired their stock in BancoKentucky Company in the belief that they were making a sound financial investment in a separate corporation, and that the BancoKentucky Company was to do things authorized by its corporate charter, as indicated in the letter of July 19, 1929."

On March 23, 1940, the Court handed down an opinion, announcing that plaintiff's bill was to be dismissed and directing counsel to submit requests for findings of fact and conclusions of law, and draft of a judgment in accordance with the opinion.

On June 29, 1940, the District Court made 67 findings of fact and stated 14 conclusions of law and, hav-

ing overruled all motions for different or additional findings, entered a judgment dismissing the bill and awarding defendants a recovery of their costs.

On July 30, 1940, the Receiver gave notice of appeal. Upon his motion, the District Court ordered that the operation and enforcement of the judgment be stayed, without supersedeas or other bond, until the final determination of this cause or until further order of the Court.

On September 30, 1940, the Receiver filed his statement of the points on which he intended to rely on the appeal, and, after obtaining three extensions of time for filing and docketing the record, filed the record on December 24, 1940.

On November 13, 1941, in the United States Circuit Court of Appeals for the Sixth Circuit, the cause was argued before Simons, Allen and Martin, JJ.

On May 4, 1942, judgment was entered, affirming the judgment of the District Court.

On June 3, 1942, the Receiver filed his petition for rehearing, which was denied on June 5, 1942.

On October 28, 1942, Petitioner filed in this Court his petition for a writ of certiorari, which was granted on December 7, 1942.

STATE OF THE RECORD.*

The three volumes of the printed record contain 961 pages. In addition, 438 exhibits were introduced by the Receiver and 27 by the defendants, all of which were ordered by the District Court to be transmitted to the Clerk of the Circuit Court of Appeals in lieu of copies. It was subsequently ordered by the Circuit Court of Appeals that its Clerk accept for filing photostatic reproductions of such exhibits as had been reproduced in this manner for the Court's use in considering the appeal. The photostatic copies of exhibits offered by the Receiver fill five quarto volumes, containing a total of 2,204 pages. And, finally, the records on appeal with the Clerk of the Circuit Court of Appeals for the Sixth Circuit in *Laurent* v. *Anderson,* No. 6384, and *Atherton* v. *Anderson,* No. 7289, were ordered by that Court to be considered as part of the record on appeal, in lieu of appellees' exhibits, designated as "Defendants' Exhibit No. 1" and "Defendants' Exhibit No. 23."

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*We call attention to the novel and somewhat confusing page headings adopted by the person who edited Volume I of the printed record. The pages (243 to 268) which contain the Court's findings and conclusions are properly headed "Findings of Fact and Conclusions of Law." The pages containing the respective motions of plaintiff and defendants for other findings (pp. 221 to 228 and pp. 269 to 283) have headings which properly describe the contents of those pages. But on pages 176 to 221, which contain plaintiff's "request" for still other findings and conclusions, the heading on each page is merely "Findings of Fact and Conclusions of Law," which is not helpful.

ARGUMENT.

The Legal Aspects of Petitioner's Claim.

The Comptroller's assessment on the stockholders of the National Bank of Kentucky gave the Receiver "an unsecured and unpreferred claim"—*Pufahl v. Estate of Parks.*[1] In that case, Mr. Justice Roberts, speaking for the Court in upholding the applicability of a State statute of limitations to a national bank receiver's claim based on a Comptroller's assessment, said:[2]

> "The statute evidences no intent to prefer the assessment over other claims against the estate, or to exempt the receiver from the pursuit of the remedy prescribed by the local law for collection of claims of the same sort." * * *
>
> "The claim may only be recovered by suit or action. The judgment obtained is collectible like any other; it has no preference in distribution if the debtor's property be in the hands of a receiver, if he has made an assignment for the benefit of creditors, or become bankrupt."

In his arguments in the courts below, the petitioner constantly insinuated that the liability resulting from a Comptroller's assessment has a peculiar sanctity which requires the courts to give to assessment claims a preference over other claims and to find a means of satisfying them without regard to the rules of law governing claims of lesser dignity, so that the defense that the stockholder's liability had been terminated by

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[1] 299 U. S. 217.
[2] *Idem*, p. 224.

a transfer of his bank shares must be regarded with special scepticism, no matter how regular it appears to be.

It is, of course, well settled that a bank stockholder may not escape liability for an assessment by transferring his bank shares to a mere agent or nominee, or by a transfer made with knowledge of the impending failure of the bank or for some other fraudulent purpose. But except in such cases the courts give full effect to transfers as terminating the transferrer's liability under the statute. He may transfer his shares to any one, without regard to the solvency of the transferee or his ability to pay an assessment upon the shares, if it should be made. In *McDonald* v. *Dewey*,[1] this Court said:

> "The stockholder is not deprived of his right to sell his stock by the fact that the sale is made to an insolvent person, unless it be made with knowledge of the insolvency of the bank."

In *Fowler* v. *Crouse*,[2] the Circuit Court of Appeals for the Second Circuit said:

> "But this provision is not intended to interfere with the right to freely transfer shares in such institutions" (p. 647).
>
> "If the bank is insolvent, and its insolvency is unknown to the seller, the transfer divests him of liability as a stockholder. To burden a seller with restrictions arising from unknown insolvency would practically take away his right to dispose of his shares" (p. 648).

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[1] 202 U. S. 510.

[2] 175 Fed. 646. See also *Earle* v. *Carson*, 188 U. S. 42 and *Lucas* v. *Coe*, 86 Fed. 972.

His right to dispose of his shares must also apply when he makes an out-and-out transfer of it for stock of another company. As a stockholder of the Bank, he no longer had any rights against it whatsoever.

For, as said by this Court, in *Klein* v. *Board of Supervisors*[1] and subsequent cases:

> "The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members."

That principle was fully recognized, and the fact that there was such a transfer was clearly claimed, by the petitioner in the *Laurent Case* when he sought a judgment on the basis of the absolute ownership of Banco of the certificates in question. In his brief in the Circuit Court of Appeals in the *Laurent Case* he states as follows at page 51:

> "The record here shows that BancoKentucky received dividends on its proportionate interest in the stock in the National Bank of Kentucky. BancoKentucky retained and exercised its right to control the votes in the National Bank of Kentucky. BancoKentucky retained and exercised its right to select Directors for the National Bank of Kentucky. BancoKentucky retained and exercised its right to secure title to the stock in itself. BancoKentucky retained every privilege which is given by the National Banking Act to stockholders; and furthermore, BancoKentucky agreed to pay any assessment which might be levied on stock of the National Bank of Kentucky." * * *

[1] 282 U. S. 19, at page 24.

When the Comptroller levied the assessment against the shareholders of the Bank, petitioner became possessed of an unsecured and unpreferred general claim. In the enforcement of it, the law gave no short cut for by-passing general rules of law that might interfere with his securing a judgment upon his claim.

One of these applicable here is the rule set forth in the *Klein Case*. If he seeks to avoid this rule, he must show that the corporation involved comes within the well-established exceptions to this rule by reason of its own character and not by reason of the fact that his claim arises under the statutory assessment allowed by the Banking Act.

When petitioner sued BancoKentucky Company on the assessment in the *Laurent Case*, he knew that the BancoKentucky Company was not listed as a shareholder upon the stock record book, which the Banking Act required the Bank to keep and which it did keep. He knew that the same record showed that 39,820 of the shares were listed in the names of six Trustees and ten shares each in the names of each of the eighteen directors of the Bank.[1]

He was fully cognizant of the fact that, Banco not being a record holder, it was necessary for him to allege and prove that Banco was the real owner of the shares involved. But he also knew that, if he recovered a judgment against BancoKentucky Company, as the true owner of these shares, he could not again sue its stockholders, as the real owner of the same shares,

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[1]**Request for Admissions, Rec. Vol. II, p. 76; Bill of Complaint, Vol. I, p. 60; also photostat copy Defendants' Exhibit No. 6 of the Bank Stock Record Book.**

because he would be bound by the judgment in the first case.

The record shows that Banco was a bona fide corporation and the true owner of these certificates and petitioner rightly decided to sue Banco as the true owner and accordingly secured a judgment so holding.

It is true that the petitioner wrote a letter to the stockholders of BancoKentucky Company, advising them that he was about to sue BancoKentucky Company, but that, if he did not succeed in collecting his claim from BancoKentucky Company, he was going to sue them as stockholders of said company. We submit, however, that this letter has not the slightest significance except to show petitioner's full knowledge of the situation, which confronted him, and the fact that he believed that Banco was the true owner. Certainly he could not create a cause of action against the stockholders simply by reason of the fact that he could not secure all of his money from the true owner. Likewise, he could not avoid the binding effect as between himself, the BancoKentucky Company and its stockholders by a mere declaration of what he intended to do.

The respondents that were found among the 2,225 persons who had transferred Participation Certificates to the BancoKentucky Company joined issue with the petitioner on the averments (a) that they had transferred their Participation Certificates to the BancoKentucky Company merely as their agent and (b) that they had made those transfers in order to evade liability for an assessment on Bank shares.

THE FACTS IN THIS CASE DO NOT JUSTIFY LOOKING BEYOND BANCO AS THE REAL OWNER OF BANK STOCK.

A variety of reasons have been advanced for the disregard of the corporate entity of the BancoKentucky Company.

The Participation Certificates appeared to be the property of that Company. If they were its property, then they were not the property of its stockholders and the stockholders of Banco were not liable as stockholders of the Bank.

For our present purpose, it is not necessary to touch upon the abstruse and metaphysical conceptions of the "entity" or "personality" of a private corporation, so entertainingly discussed by Mr. Machen in his article, "Corporate Personality."[1] In *Klein* v. *Board of Supervisors,*[2] Mr. Justice Holmes, speaking for the Court, said:

> "But it leads nowhere to call a corporation a fiction. If it is a fiction it is a fiction created by law with intent that it should be acted on as if true. The corporation is a person and its ownership is a nonconductor that makes it impossible to attribute an interest in its property to its members."

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[1]24 Harvard Law Review, 253, 363:

"The doctrine of corporate personality is a natural though figurative expression of actual facts. It is only by study and artificiality that we can train ourselves to make it confusing or misleading. The best method of dealing with the doctrine that a corporation is a legal personality is, therefore, to think less about it. The conception itself is a natural one. We do not need to be instructed to regard a corporation as an entity and to regard that entity as a person: our minds are so constituted that we cannot help taking that view. Being a natural conception, it will tend to find its proper place in the law, if only we cease to regard it as something mysterious or technical."

[2]282 U. S. 19, at p. 23.

In *Puerto Rico* v. *Russell and Co.*,[1] Chief Justice Stone, then an Associate Justice, speaking for the Court and having reference to the jurisdictional rule obtaining in the federal courts that the domicile of a corporation, not that of its individual stockholders, is controlling as to diversity of citizenship, said:

> "In its final form this rule of jurisdiction was stated in terms of a 'conclusive presumption' that the stockholders are citizens of the State of the corporate domicile [citing cases], but even those who formulated the rule found its theoretical justification only in the complete legal personality with which corporations are endowed. Fictitious that personality may be, in the sense that the fact that the corporation is composed of a plurality of individuals, themselves legal persons, is disregarded, but 'it is a fiction created by law with intent that it should be acted on as if true.' *Klein* v. *Tax Supers.*, 282 U. S. 19, 24.".

In *Cannon Manufacturing Co.* v. *Cudahy Packing Co.*,[2] the question was whether a Maine corporation (Cudahy Packing Company) was doing business within the State of North Carolina and was, therefore, suable there, because it held all of the stock of a subsidiary corporation (Cudahy Company of Alabama) which was doing business in North Carolina. In affirming the judgment of the District Court for the Western District of North Carolina, dismissing the action for lack of jurisdiction, Mr. Justice Brandeis, speaking for the Court, said:

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[1]288 U. S. 476.
[2]267 U. S. 333.

"In the case at bar, the identity of interest may have been more complete, and the exercise or control over the subsidiary more intimate, than in the three cases cited, but that fact has, in the absence of an applicable statute, no legal significance. The corporate separation, though perhaps merely formal, was real. It was not pure fiction" (p. 336).

"It is not contended that the Alabama corporation was dissolved *ipso facto* by this concentration of its stock or that its property became, in law, that of the defendant" (p. 337).

We submit that there is nothing in this record that justifies any departure from the rule that a corporation "is a person and its ownership is a non-conductor that makes it impossible to attribute an interest in its property to its members."[1] An attempt to disregard the corporate personality of the BancoKentucky Company was made in the case of *Anderson* v. *Akers, supra,* in order that the directors of the National Bank of Kentucky might be held liable for making loans on the security of the stock of the Bank. The loans had been made on the security of stock of the BancoKentucky Company and it was claimed that there was such a connection or relationship between the Bank and its stockholder, the BancoKentucky Company, as to make these loans, in effect, loans upon the stock of the Bank. The District Court overruled the Master and upheld the Receiver on this point and awarded a recovery to him against the Bank directors, upon the theory that there had been a violation of the Bank Act. But the

[1]*Klein* v. *Board of Supervisors, supra.*

Circuit Court of Appeals[1] reversed the judgment of the District Court, saying (p. 536):

"We come then to the question whether the relation between the bank and the BancoKentucky Company was such that a court of equity would be warranted in disregarding the existence of Banco as a separate corporate entity. It is true that Banco was conceived in the vaulting imagination of the president of the bank; that it was promoted and fostered by the appellants; that the directorates of the two corporations, though not identical, overlapped; that the great majority of trust participation certificates representing stock in the bank became the property of Banco, and that there is a suggestion of identity in the name adopted for the new company. But Banco was not a mere holding company for the bank's stock. It was organized for clearly defined purposes, too optimistically conceived, perhaps, but neither illegitimate nor unlawful. It had its own capital with cash resources at one period almost twice the entire capital and surplus of the bank. While in the very beginning the bank stock may, as found by the court, have been its principal asset, and may have continued thereafter to be its most valuable single asset, it had other assets of very substantial value, and it was warrantable inference at the time of its organization and for a substantial period thereafter that it could well meet any assessment that might be levied upon it as a stockholder of the bank. At any rate there is nothing in the record to point to its creation for the purpose of escaping such assessment. Indeed when

[1]*Atherton v. Anderson*, 86 Fed. (2d) 518.

the assessment was finally made by the Comptroller it was enforced against Banco and not against the stockholders. See Laurent v. Anderson, *supra*. Its separate corporate existence was recognized by the very receiver on whose behalf we are now asked to ignore it."

In the instant case, the District Court made the following findings of fact:

Banco was "organized in good faith," was "certainly not a sham," was "not organized for a fraudulent purpose or to conceal secret or sinister enterprises conducted for the benefit of the bank," was not "a mere holding company."[1]

And the Court stated the following conclusions of law:

Banco was "the true, legal and beneficial owner of the stock of the Bank." The transfers of Participation Certificates to Banco "were out and out transfers and Banco thereby acquired full legal title thereto." The stockholders of Banco "were not stockholders of the Bank within the meaning of the statute."[2]

The Circuit Court of Appeals, in affirming the judgment dismissing the bill, made the following summary statement of its conclusions:

> "The BancoKentucky Company was a legal entity, separate and distinct from its shareholders. The record reveals no underlying purpose of those who organized it or invested in its shares to afford asylum to stockholders of a national bank, seeking

[1]Findings of Fact 61 to 64, inclusive, R. I, p. 267.

[2]Conclusions of Law 9, 10 and 11, R. I, pp. 267 and 268.

escape from the rigidity of individual liability for double assessment. Banco was not a mere sham corporation, nor was it exclusively a holding company. It existed vitally as an independent corporation and not as a mere conduit for the flow of national bank-stock dividends to individuals. The corporation has been held liable as the real and beneficial owner of a large majority of the capital stock of a defunct national bank.

"In our judgment, the reach of double liability assessment within the true meaning of the National Banking Act does not extend beyond the Banco-Kentucky Company to its stockholders."

In support of his claim that Banco was a "corporate agency and instrumentality" for its stockholders, the petitioner relied, in both courts below, chiefly upon the case of *Barbour* v. *Thomas*.[1] In his petition for certiorari in the instant case, he declared that the "factual situation" in the *Barbour Case* was "strikingly parallel if not exactly identical to this case." We submit that any resemblance between the two cases is only superficial. It is true that both cases involved an attempt to impose liability for a Comptroller's assessment upon persons who were not the record-holders of the stock of the insolvent bank. But there the resemblance comes to an end. If the cross-defendants in the *Barbour Case*, like the respondents in the instant case, had denied liability solely upon the ground that they were not the owners of bank shares, they would not have had a leg to stand on. In the absence of extraneous circumstances, their liability was clear, not

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[1] 86 Fed. (2d) 510.

merely because of the peculiar nature of the Detroit Bankers Company in which they were stockholders, but also because they had expressly assumed liability for the assessment. But the stockholders of the Detroit Bankers Company did not defend the receiver's action upon the ground that they were not owners of bank shares. They relied upon certain extraneous circumstances which do not appear in the instant case. As was pointed out by Judge Hayes, who tried that case in the District Court,[1] they alleged:

> "That (1) article IX in the charter [by which the stockholders of the Bankers Company expressly assumed liability] was contrary to the general law of Michigan and void; that (2) the provision undertaking to require a shareholder to assume the stock assessment liability was a promise to assume the debt of another, and not signed by the shareholder or any one by him authorized, and was not valid under the statute of frauds; and that (3) if the provision in the charter was valid and the statute of frauds inapplicable, the promise, if any, was contractual and unenforceable for that the liability arose from conditions not within control of the corporation and not in the contemplation of the parties, the liability arising from insolvency which was brought about by (a) the illegal acts of the Governor of Michigan in declaring state banking holidays, (b) the illegal acts of the President of the United States in declaring national banking holidays, and by (c) the illegal acts of the conservator who sold the liquid assets of the bank."

[1] *Barbour v. Thomas*, 7 F. Supp. 271, at 274.

It will be observed that none of the questions presented in the *Barbour Case* are presented in the instant case. In the *Barbour Case* all of the claims of exoneration from the assessment advanced by the stockholders of the Bankers Company were rejected both by the District Court and the Circuit Court of Appeals, chiefly upon the ground that they involved a collateral attack on the Comptroller's decision as to the solvency of the bank and the need for the assessment.

The *Barbour Case*[1] and the *Atherton Case*[2] were handed down by the Circuit Court of Appeals for the Sixth Circuit on the same day (November 11, 1936). Hicks and Simons, J.J., sat in both cases. The Detroit bank receiver won in the first case and his Louisville colleague lost in the second.

In the *Barbour Case*, Judge Hicks, speaking for the Court, gave a careful and detailed analysis of the extraordinary nature of the Detroit Bankers Company. It was, indeed, a *bankers'* company. It was, essentially and exclusively, an instrumentality of the five constituent banks by which it was conceived, organized, financed, dominated and ultimately dissolved. At least for the first five years (it lasted only three years), the absolute control was in the five constituent banks, which supplied ratably its only funds, to-wit, $1,200. This modest sum was the basis for the issue of 120 "trustees shares," having no par value and issued, ten shares each, to twelve trustees, nominated by the banks from the members of their respective directorates. The

[1]*Barbour* v. *Thomas*, 86 Fed. (2d) 510.
[2]*Atherton* v. *Anderson*, 86 Fed. (2d) 518.

trust upon which these shares were held by the nominees of the banks was that they should be voted by the trustees at all elections of directors for persons who were holders of ten trustees' shares and that each trustee should have the right to vote for himself for director, "the spirit of the foregoing being to perpetuate a proportionate representation of each of the foregoing institutions or their successors during the period of the trust." The expenses of the Bankers Company were met by the levy of "service charges" on the several constituent banks.

None of the stockholders of the Bankers Company had a voice in its affairs or a vote in its elections. Indeed, there were no elections. The unquestioned control was in a self-perpetuating oligarchy composed of the nominees and puppets of the five constituent banks, whose stockholders exchanged their bank's shares for shares of the Bankers Company in reliance upon this air-tight system of control by the banks in which they were interested.

Upon this showing, Judge Hicks announced the following conclusion:

> "We concur in the finding that appellants are 'actual owners' of stock of the bank upon which the assessment was levied. The stockholders never sold their stock. They simply exchanged it for holding company shares. The holding company certificates represented the interests which the shareholders of each unit held or acquired in the assets of the group. None of the stock was sold to the public nor issued to any persons other than

the stockholders of the banks or their assignees. * * * Stockholders of the banks had no intention of retiring from the banking business. They organized the holding company for the protection and promotion of their common interests because they realized that the banks acting separately were at a disadvantage in competing with the Guardian-Detroit-Union group. * * * They were careful to provide that the holding company should be under the exclusive control of officers and agents of the component banks at least until December 31, 1934."

Referring to Article IX of the charter of the Bankers Company by which the holders of stock of the Bankers Company assumed liability for any assessment against the stock of any of the unit banks, Judge Hicks observed that this assumption of liability by the stockholders of the Bankers Company "constituted additional evidence that they regarded themselves in their relationship to the creditors and depositors of the bank as the true and real owners of its stock." Simultaneously with the handing down of this opinion by Judge Hicks, Judge Simons handed down the opinion of the same Court in *Atherton* v. *Anderson, supra*, from which we have quoted at length (*supra*, p. 41).[1]

Purchasers of Banco stock acquired the usual rights and none other than those of a stockholder. Those who traded T.P.C.'s for Banco shares parted with all title to their T.P.C.'s and made no arrangement of any kind that reserved to them any further right regarding the latter shares, or any different right in regard to their

[1]*Atherton* v. *Anderson, supra*, at p. 536.

Banco stock than that possessed by the stockholders of other corporations. They retained no power, and had none, as stockholders of Banco to require the corporation either to dispose of its acquired T.P.C. shares or to keep them. There was no contract or arrangement that prevented Banco from handling every single asset it owned exactly as any other corporation might do.

The directors of Banco never coincided with the directors of the National Bank of Kentucky. True, at all times the National Bank of Kentucky directors were directors of Banco, but the former Louisville National Bank directors were never directors of the Bank of Kentucky, and after January, 1930, the directors of the National Bank of Kentucky were continuously in a minority on the Banco Board.

The stockholders reserved to themselves no power to control the management or disposition of the assets of Banco, except the indirect control resulting from the power to elect the directors of the company. Nor was there any arrangement by which the conduct of the affairs of Banco could be controlled in any degree by any bank whose shares were held by Banco.

It was true that in the initial stages of Banco's course the overlapping personnel of the directorates of Banco and the two banks in which it then held stock made possible a large measure of co-operation between those separate institutions. This was, indeed, one of the objectives which it was hoped would be attained through the organization of Banco. But there were no interlocking controls which deprived any of those in-

stitutions of the unfettered power to conduct its own affairs.

There was no "channelling" of bank dividends through Banco to stockholders who had exchanged bank shares for Banco shares, in the sense in which the Receiver uses that expression. Banco derived income from other sources than the bank shares held by it. The dividends paid to its stockholders were in a much larger amount than the income received by it from bank dividends and it was only because of Banco's income from other sources that it was able to declare and pay the dividends which it paid to its stockholders. This subject is fully explained by the Receiver's accountant and witness, Hugh A. White (R. II, pp. 132-134):

> "The total dividends paid by Banco to all its stockholders during any one period exceeded the amount of dividends received by Banco on Trustees' Participation Certificates. There was no period when the income from bank stock held by Banco equalled the dividend payment."

But nothing we might say to distinguish the instant case from the *Barbour Case* could equal in clarity and cogency the simple contrast of the pictures of the Detroit Bankers Company and the BancoKentucky Company drawn by Judge Hicks and Judge Simons in their respective opinions in the *Barbour Case* and the *Atherton Case*. We submit that the grounds upon which Judge Hicks predicated the liability of the stockholders of the Detroit Bankers Company are conspicuously absent from the instant case.

Among the other cases relied upon by the petitioner in the courts below, a conspicuous place was given to the case of *Fors* v. *Farrell.*[1] The most authoritative commentary upon that case is to be found in a later opinion of the same Court (Supreme Court of Michigan) in *Burrows* v. *Emery.*[2] In that case the receiver of an insolvent bank sought to enforce an assessment upon the stockholders of the bank against the stockholders of a corporation which itself held stock of the insolvent bank. The case was heard by the entire bench of the Court of eight members, including three of the judges who concurred in the decision in *Fors* v. *Farrell Case.* The decision, affirming the judgment of the lower court dismissing the receiver's petition, was unanimous.

After explaining and distinguishing five of petitioner's favorite cases, namely, *Fors* v. *Farrell, supra, Corker* v. *Soper,*[3] *Metropolitan Holding Company* v. *Snyder;*[4] *Nettles* v. *Rhett,*[5] and *Barbour* v. *Thomas, supra,* the Court said:

> "These and other cases cited by plaintiff may be summed up in the statement of Justice North in Fors v. Farrell, *supra*: 'That neither an individual nor a corporation can through a trust arrangement or by other indirect means of circumlocution *possess as an owner* and enjoy the beneficial interest in bank stock without assuming the contingent liability of a stockholder's assessment imposed by

[1] 271 Mich. 358, 260 N. W. 886.
[2] 285 Mich. 86, 280 N. W. 120.
[3] 53 Fed. (2d) 190.
[4] 79 Fed. (2d) 263.
[5] 94 Fed. (2d) 42.

law. To hold otherwise would be to nullify the protection given the bank creditors by the statute imposing double liability.' *This rule is not meant to lend aid to an effort to attack a bona fide corporate entity and hold shareholders of that corporation liable for a bank assessment levied upon bank stock which the corporation owns.*

> "'The corporation will be regarded as a legal entity as a general rule, and the courts acting cautiously and only when the circumstances justify it, will ignore the fiction of corporate entity, where it is used as a blind or instrumentality to defeat public convenience, justify wrong, or perpetrate a fraud, and will regard the corporation as an association of persons.' Majestic Co. v. Orpheum Circuit, Inc., 8 Cir. 21 F. (2d) 720, 724. See, also, People v. Michigan Bell Telephone Co., 246 Mich. 198, 224 N. W. 438. * * *

"*Here the stockholders did not assume liability for an assessment and the history of the corporation persuades one to believe that it enjoyed a bona fide existence free from fraudulent intent to evade liability.*"

In bringing to an end our discussion of this branch of our subject, we would call attention, not only to the findings of the District Court quoted above, but also to the fact that Judge Martin, speaking for the Circuit Court of Appeals in the instant case, after quoting from Judge Simons' opinion in the *Atherton Case*, said:

"The additional evidence adduced in the case at bar, though on a different issue, presents no discernible reason for change in the Court's previously expressed concept of the character of the BancoKentucky Company."

THE FACTS IN THIS CASE DO NOT SUSTAIN THE CLAIM THAT THE BANK WAS INSOLVENT OR THAT RESPONDENTS TRANSFERRED THEIR SHARES WITH KNOWLEDGE OF IMPENDING FAILURE.

The petition for certiorari (page 9) thus states the legal question presented to this Court:

"Are the owners of an insolvent national bank relieved from individual liability * * * because, shortly before the bank's failure, they organized a holding company and exchanged their bank shares for holding company shares."

We have diligently tried to understand and follow the petitioner's contentions with regard to this claim throughout the entire course of this case. An examination of petitioner's bill will disclose that it contains no mention of the insolvent, or failing, condition of the Bank, at the time of the organization of Banco or at the time of the transfer of T.P.C.'s, and no claim that respondents transferred their shares with knowledge of any such condition. The bill did not even hint at the existence of the issue now presented.

During the course of the trial much proof was offered by petitioner which could have no conceivable place in the case unless it was addressed to this issue.

We have heretofore shown (pages 6, 7) that at the conclusion of the trial petitioner expressly disclaimed any intention of charging that the respondents transferred their T.P.C.'s "with knowledge of the impending failure" of the Bank or that they knew of the Bank's condition in 1929 or that the Bank "was insolvent, in any sense of the word, when Banco was organized, and much less that the organizers knew it." This claim was completely abandoned during the proceedings before the Circuit Court of Appeals and this issue is not even mentioned in the opinion of that Court. That this question should now be presented to this Court as the underlying legal issue in the case is unusual to say the least.

The question as stated in the petition does not contain all of the elements required by the statute. One important element, *i. e.,* "knowledge" of impending failure, is entirely omitted from petitioner's statement of the issue. But if respondents are to be held liable for assessments as transferrers of their stock within the meaning of the statute, knowledge is an indispensable element.

In the trial of the case below, petitioner made absolutely no effort to prove knowledge of the condition of the Bank on the part of any of the respondents. The proof introduced by respondents was so strongly to the contrary that the District Judge finally directed the entry of a stipulation (R. I, p. 174) to the effect that respondents, except officers, directors, or employees, would testify

"that each of them acquired their respective shares of stock in BancoKentucky, believing, as distinguished from whatever constructive knowledge may be imputed to them as a matter of law, that the Louisville Trust Company and the National Bank of Kentucky were both solvent and sound financial institutions, and that they did not even remotely suspect that either of said banking institutions were in a questionable financial condition, if such they were, and that they acquired their stock in BancoKentucky Company in the belief that they were making a sound financial investment in a separate corporation, and that the BancoKentucky Company was to do the things authorized by its corporate charter, as indicated in the letter of July 19, 1929."

The truth of the testimony of respondents on this issue cannot be doubted. Many of these same respondents who transferred their T.P.C.'s, which then had a potential assessment liability of $1,437,620.00, at the same time made cash purchases of an additional 178,878 shares of Banco for the sum of $4,471,950.00 (R. I., p. 256). Of the above respondents, those who were directors of the Bank and the Trust Company, who then held T.P.C.'s carrying a maximum assessment liability of $761,150.00 subscribed for 47,188 additional Banco shares for which they paid in cash the sum of $1,179,750.00, or $418,600.00 more than their assessment liability. It is inconceivable now, and was inconceivable at the time of the trial, that these respondents could have been suspicious of the condition of the Bank or could have been attempting to evade a possible liability of $1,437,620.00 when they made a simultaneous

cash investment in the stock of Banco three times as large as any possible liability.

The truth of their testimony is further borne out by the fact that respondents who are now charged with attempting to evade assessment liability retained to the end deposits in the Bank and the Trust Company in excess of $2,000,000.00 (R. I, p. 267).

Their confidence in the Bank was justified by its published statement of July 11, 1929, which showed, in addition to a capital of $4,000,000.00, surplus, undivided profits and reserves of $2,929,034.48 (R. I, p. 263; Finding 42).

Another important fact which discloses the confidence of these respondents and the community in general in the condition of the Bank is that at the time Banco was organized T.P.C.'s were selling freely in the open market at from $47 to $50 per share. Bearing in mind that these certificates were of a $10 par value, the market on these shares demonstrates that these respondents were justified in feeling that they were disposing of an asset of substantial value when they exchanged their T.P.C.'s for Banco stock, and the thought of a possible assessment liability against stock selling at five times its par value was non-existent. At that time T.P.C.'s and Bank stock had a long and uninterrupted record of large dividend payments.

Before the Circuit Court of Appeals the petitioner sought to support his claim of knowledge by the contention that respondents, as stockholders in the Bank, were chargeable with knowledge which was assumed to have been in the possession of the officers of the Bank

(R. I, p. 291; Point 6). As no support could apparently be found for this contention, it now appears to have been abandoned and, for the first time, the charge is directly made in petitioner's brief in this Court (p. 34) that the stockholders themselves had actual knowledge of the claimed condition of the Bank and themselves engineered what is now alluded to as a scheme to "avoid" or "escape" liability.

The facts of this case are sufficient to eliminate completely all of these contentions. The District Court found (R. I, p. 267):

> "There were irregularities in the handling of some of the credit accounts of the Bank, but the soundness of the Bank and its ability to meet its obligations could not be questioned, until long after the formation of Banco."

The District Court also found (R. I, p. 255):

> "Banco was established for its avowed purposes with no thought on the part of any of its organizers of avoiding double liability on their Banco stock."

The Circuit Court of Appeals held (127 F. (2d) 696, at p. 703):

> "The record reveals no underlying purpose of those who organized it or invested in its shares to afford asylum to stockholders of a national bank, seeking escape from the rigidity of individual liability or double assessment."

Petitioner's statement of the sole legal question now presented to the Court, even if sustained to the

fullest extent, could in no event be sufficient to cast liability upon that large group of respondents who admittedly never owned stock in the Bank and who never exchanged such stock for Banco stock but who acquired their stock in Banco by purchase after its organization.

It is respectfully submitted that this record gives no support to the claims now made but heretofore abandoned, that the Bank was insolvent or that respondents transferred their T.P.C.'s for the fraudulent purpose of escaping liability to assessment as stockholders of the Bank.

RES JUDICATA: THE DECISION IN LAURENT v. ANDERSON IS CONCLUSIVE OF THE ISSUE THAT BANCO, AND NOT ITS STOCKHOLDERS, WAS THE REAL OWNER OF BANK SHARES AND LIABLE FOR THE ASSESSMENT.

Among other defenses to the claim made by petitioner here, respondents pleaded[1] that the judgment rendered in favor of the Receiver of the National Bank of Kentucky in the case of *Laurent* v. *Anderson*, affirmed by the Circuit Court of Appeals for the Sixth Circuit,[2] is *res judicata* against petitioner's claim here.

Laurent v. *Anderson* was a suit by the Receiver of the National Bank of Kentucky, petitioner here, seeking to hold the BancoKentucky Company as *the real owner of the same Trustees' Participation Certificates, representing stock of the Bank.*

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[1] Transcript of Record, Vol. I, Paragraph III, p. 105.
[2] 70 Fed. (2d) 819.

The basis of respondents' claim that this judgment is *res judicata* is that, as stockholders of the Banco Kentucky Company, they are in privity with that corporation, touching corporate matters, and are, therefore, bound by that judgment, even though not named as parties in that suit. Respondents being bound, the petitioner, as the one who obtained said judgment, is likewise bound. The Receiver of the Bank, having secured a judgment against Banco, with whom respondents were in privity, that Banco was *the real and true owner of the bank stock* involved here, cannot re-litigate that question in a subsequent, collateral proceeding against any of the parties or privies to the first action.

In speaking of *res judicata,* this Court in *Oklahoma* v. *Texas*[1] says (p. 85):

> "The general principle applied in numerous decisions of this court, and definitely accepted in Southern Pacific R. R. Co. v. United States, 168 U. S. 1, 48-49, is *that a question of fact or of law distinctly put in issue and directly determined by a court of competent jurisdiction as a ground of recovery or defense in a suit or action between parties sui juris is conclusively settled by the final judgment or decree therein so that it cannot be further litigated in a subsequent suit between the same parties or their privies, whether the second suit be for the same or a different cause of action.* As was declared by Mr. Justice Harlan, speaking for the court in the case cited (p. 49): 'This general rule is demanded by the very object for which civil courts have been established, which is to

[1] 256 U. S. 70.

secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them'."

To determine what was involved in the case claimed to be *res judicata* the Court laid down the following rule (p. 88):

"What was involved and determined in the former suit is to be tested by an examination of the record and proceedings therein, including the pleadings, the evidence submitted, the respective contentions of the parties, and the findings and opinion of the court;" * * *

In *Hawkins* v. *Glenn*[1] this Court stated the rule, as applying to situations such as are presented here, saying:

"We think it cannot be doubted that a decree against a corporation in respect to corporate matters, such as the making of an assessment in the discharge of a duty resting on the corporation, necessarily binds its members in the absence of fraud and that this is involved in the contract created in becoming a stockholder."

[1] 131 U. S. 319, 332.

That the stockholders are in privity with the corporation to such an extent that their presence in a suit touching corporate matters is not necessary to bind them has been announced many times by this Court.

In *Hawkins* v. *Glenn, supra,* the Court stated the rule thus:

> "It was not necessary that the stockholders should be before the court when it [the order] was made, any more than that they should have been there when the decree of bankruptcy was pronounced."

Again, in the same case, this Court said:

> "A stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member."

This was quoted with approval and applied in the later case of *Hancock National Bank* v. *Farnum.*[1]

The rule has never been modified by this Court in any way, so far as we have found.

Analysis of the proceedings in *Laurent* v. *Anderson, supra,* will show that it has been finally determined by judgment of a court having jurisdiction that the Banco-Kentucky Company was the actual owner of the Trustees' Participation Certificates, representing the shares of stock of the National Bank of Kentucky, here involved, and was consequently the real owner of the Bank shares represented by those Certificates.

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[1] 176 U. S. 640, 644.

The record in the case of *Laurent* v. *Anderson* is filed in this caso as "Defendants' Exhibit No. 23."

Examination of that record shows that the plaintiff in that case was the same as the petitioner here, namely, the Receiver of the National Bank of Kentucky.

The Receiver of the National Bank of Kentucky was represented by the same counsel in that case that represent him here.

The defendant in the *Laurent Case* was the Banco-Kentucky Company.

While the respondents were not named as defendants in that case, their connection with the BancoKentucky Company, as stockholders, automatically made them privy to the judgment.

Respondents and Banco being bound by this judgment and unable to litigate again with the Receiver of the Bank, the question of Banco's true ownership of the T.P.C.'s and the underlying Bank stock, the Receiver of the Bank, petitioner here, is also bound by that judgment and is, therefore, unable to re-litigate that question with Banco or its stockholders.

The imposition of the liability here being purely statutory, in order to succeed in the suit against Banco, it was necessary for the Receiver, petitioner here, to bring the BancoKentucky Company within the purview of the statute. Banco not being a record-holder of Bank stock, the petitioner was compelled to claim that the BancoKentucky Company was the real owner of the stock involved and accordingly so brought his suit.

There has never been any claim of joint ownership and obviously, therefore, a decision holding that Banco "was in every sense the true and beneficial owner of the national bank stock involved" excluded any one else from being the real owner of that stock.

The statute imposes liability upon *shareholders* of the Bank, and upon transferrers within sixty days or with knowledge of impending failure. The only other exception recognized in the decisions of this Court is that record holders, even though not the true owners, may be held upon the ground of estoppel, in which case a subsequent claim asserted against the true owners is not inconsistent. Certainly, this rule does not apply here, since in the *Laurent Case* the BancoKentucky Company was not sought to be held as the record holder of Bank stock. It was *sought to be held*, and *was actually held*, as the real and beneficial owner of the Bank stock, represented by the Participation Certificates held by it.

This was announced in the opinion of the Circuit Court of Appeals in the *Laurent Case*[1] and is conclusively shown by Respondents' Exhibit "No. 6" and Stipulation in reference thereto filed in this case. Exhibit "No. 6" is a photostatic copy of the Stock Record Book of the National Bank of Kentucky, certified by the Comptroller. It contains neither the name of the BancoKentucky Company nor the name of any of the respondents herein, except those who were directors of the Bank.

[1] 70 Fed. (2d) 819.

In order, therefore, that the BancoKentucky Company be held liable for an assessment, it was necessary for the Bank Receiver in the *Laurent Case* to allege and prove, not only that the T.P.C.'s which Banco did own were equivalent to Bank stock, but *also* that the BancoKentucky Company was the true owner of the T.P.C.'s.

This he did allege and prove in the *Laurent Case*.

As clearly showing his claim that *Banco was the real owner,* we refer to page 51 of his brief in the Circuit Court of Appeals in the *Laurent Case,* where he makes this argument:

> "The record here shows that BancoKentucky received dividends on its proportionate interest in the stock in the National Bank of Kentucky. BancoKentucky retained and exercised its right to control the votes in the National Bank of Kentucky. BancoKentucky retained and exercised its right to select Directors for the National Bank of Kentucky, BancoKentucky retained and exercised its right to secure title to the stock in itself. BancoKentucky retained every privilege which is given by the National Banking Act to stockholders; and furthermore, BancoKentucky agreed to pay any assessment which might be levied on stock of the National Bank of Kentucky." * * *

BancoKentucky could only have attained the rights above referred to by an out-and-out transfer of Trustees' Participation Certificates to it. There has never been any claim that Banco held this stock subject to any agreement concerning it with the transferor. The acquisition of these rights by Banco came through the sale of the stock to Banco and as an incident thereof.

The former T.P.C.-holder lost them at the same time Banco acquired them.

In his conclusion in the same brief is this statement (p. 52):

> * * * "A decision denying the right of the Comptroller of the Currency to collect the assessment levied *in this case from the true owners of the National Bank of Kentucky* would undermine a fundamental security of depositors."

In order to sue the BancoKentucky Company, which was in receivership, it was necessary for Keyes, then Receiver of the National Bank of Kentucky, to secure the consent of the Jefferson Circuit Court in Kentucky. He accordingly filed in a pending suit, known as *Carroll* v. *Chemical Bank & Trust Co.*, a petition seeking leave to sue the BancoKentucky Company for the assessment here involved. In that petition he alleged, under oath:

> "Your Petitioner further represents that at the time of the closing of said National Bank and the appointment of your Petitioner as Receiver, the defendant, The BancoKentucky Company, was the *owner and holder* of 540,484 Trustees' Participation Certificates," * * *.

With this petition the plaintiff, Keyes, tendered an order drawn by him, which the Court signed, to the following effect:

> "It is therefore ordered, adjudged and decreed that Paul C. Keyes, as Receiver of the National Bank of Kentucky, be and he hereby is granted

leave and authority by this Court to commence and prosecute to final judgment an appropriate action at law against Joseph S. Laurent, hereunto duly appointed Receiver of The BancoKentucky Company, and the duly acting and qualified Receiver of said company, to recover such sum of money as said Paul C. Keyes, as Receiver, *may claim to be due from The BancoKentucky Company as an assessment upon the shares of capital stock of the National Bank of Kentucky or upon certain Trustees' Participation Certificates claimed to represent the ownership of capital stock of the National Bank of Kentucky by The BancoKentucky Company* and any final judgment recovered in such action shall be a valid and just claim against said Joseph S. Laurent, as Receiver of The BancoKentucky Company herein, to be filed in this action for determination as to its rights of distribution in relation to other claims."

In the *Laurent Case* plaintiff thus states, under oath, the basis of his claim:[1]

"that said money is due him as an assessment upon the shares of stock of The National Bank of Kentucky *owned* by The BancoKentucky Company at the time plaintiff was appointed Receiver or upon certain Trustees' Participation Certificates, representing The National Bank of Kentucky stock, *owned* by The BancoKentucky Company at the time of said appointment of plaintiff as Receiver."

Again, on page 6 of the same exhibit:

"The BancoKentucky Company and/or Joseph S. Laurent ever since September 19, 1929, has been

[1]Defendants' Exhibit No. 23, p. 6, Rec., *Laurent v. Anderson.*

and is the *owner and holder* of said Trustees' Participation Certificates for Five Hundred Forty Thousand Four Hundred eighty-four (540,484) shares, of the par value of $10 per share each of said trust estate."

In his printed brief in the District Court in the five cases, which reached the Court of Appeals under the style of *Laurent* v. *Anderson,* he states this general heading (p. 17):

> *"The holders of trustees' participation certificates were the true and beneficial shareholders of the National Bank of Kentucky and as such are liable for the assessment made by the comptroller."*

At page 29 he says:

> * * * "We believe that in the instant case the holder of a Trustees' Participation Certificate is the real stockholder. Being such he is liable for an assessment."

Again, at page 38:

> "There are numerous other cases where technicalities are disregarded and persons have been held liable whom the Court describes as 'the real owners,' 'the actual owners,' 'the substantial owners,' 'the true owners,' 'the equitable owners,' 'the beneficial owners,' 'the owners in fact,' and 'those to whom the shares really belong.' Each of the phrases listed above could be applied to the defendants in these cases as holders of Trustees' Participation Certificates. These defendants control every action of the Trustees. They were the true stockholders of the Bank. They were listed

as beneficial owners of the stock on the list of certificate holders certified to and kept by the Bank under the terms of the trust. If they were not the stock owners, then the National Bank of Kentucky had no stock owners!" * * *

In the District Court the Receiver claimed throughout his brief that the assessment should be sustained because Banco was the *true owner* of the stock here involved.

In sustaining the Receiver, Judge Cochran held:[1]

> * * * "*Nor is it of any consequence* that the BancoKentucky Company never owned in any way any stock in the National Bank of Kentucky *and that it acquired its equitable interest therein by purchase of Trustees' Participation Certificates from those who had been such owners and taken them in substitution for their stock.* Upon the acquisition of such stock that Company became the beneficial *and hence the actual and real owner thereof* and hence subject to assessment."

In a separate finding of facts and law in said cause Judge Cochran also found:[2]

> "That the BancoKentucky Company, and the defendant, Joseph S. Laurent, its Receiver, was *the actual and real owner* of 37,721.624 shares of stock of the National Bank of Kentucky, having a par value of $100,00 per share on November 17, 1930."

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[1]*Keyes* v. *American Life & Accident Ins. Co.*, 1 F. Supp. 512, 513.
[2]Defts.' Exhibit No. 23, p. 18, Rec., Laurent v. Anderson.

The case was appealed to the Circuit Court of Appeals for the Sixth Circuit and an opinion[1] was rendered, affirming Judge Cochran. The opinion states the actual question involved and decided by the Court. At page 820 of the reported opinion, it is said:

> "Banco *never held stock in the National Bank of Kentucky* but several years after the date of the agreement purchased the trustees' participation certificates which had been issued under the agreement."[2]

Again, at page 820:

> "The assessment of double liability was made against Banco upon the theory that, being the holder of Trustees' Participation Certificates issued under a trust agreement dated April 22, 1927, it was the real and beneficial owner of national bank stock."

The Court held (p. 824):

> "The evidence establishes that Banco was in every sense the true and beneficial owner of the national bank stock involved."

Again (p. 824):

> "The petition and especially the evidence sustain recovery against Banco as the real and beneficial owner under Section 64 of the National Banking Act (12 U. S. C. A.)."

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[1]70 Fed. (2d) 819.

[2]Agreement of 1927, Trusteeing stock of National Bank of Kentucky and The Louisville Trust Company.

The judgment of the District Court, holding Banco to be the real owner of the Bank stock, was affirmed.

Let us see what was the respondents' position after the rendition of this judgment.

The Receiver of the BancoKentucky Company paid something over $90,000 on this judgment.

In his present Bill, the petitioner says, Paragraph VII:[1]

> "* * * the defendants [respondents] are the real, true and beneficial shareholders of the National Bank of Kentucky and have promised to pay said assessment and are estopped to deny said assessment liability, and are the owners of shares of stock of the National Bank of Kentucky and each of the defendants appearing to be stockholders of the BancoKentucky Company is liable for the payment of the assessment levied by the Comptroller of the Currency hereinbefore referred to, individually, ratably and proportionately to the extent that the number of shares of stock held by him bears to the total number of shares issued and outstanding."

Having brought one suit and secured his judgment against the BancoKentucky Company, upon the ground that it was the "*real, true and beneficial owner*" of the identical stock here involved and having bound the stockholders of that corporation (respondents here) by that judgment, is it conceivable that he can now assert the same claim *against the respondents* and have this Court adjudge that they are the real, true and

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[1] I R., p. 69.

beneficial owners, simply because the interest of the petitioner would be benefitted thereby?

Petitioner seeks to avoid the effect of the *Laurent Case* by *now* claiming (Brief, p. 3) that in that case Banco was sued as the *record owner* of Bank stock and not as the real owner. The analysis of the *Laurent Case* which has here been made shows that the petitioner's present position is untenable. At no time in that case, from start to finish, was Banco claimed to be the *record owner* of Bank stock. The record in the instant case shows also that petitioner's claim is unfounded. Neither Banco nor any of the respondents (except Bank directors) were registered as shareholders of the Bank when it closed, as was expressly affirmed by petitioner in his request for admission by respondents that all of the outstanding shares (except 180 shares registered in the names of eighteen directors) were registered "in the names of Henry Vogt, Thomas J. Minary, Stuart E. Duncan, Allen P. Dodd, Charles A. Bohmer and Ben J. Metcalfe, as trustees under trust agreement dated April 22, 1927" (R. II, p. 76, Request 6; also Defendants' Exhibit 6).

This Court said in *Hart Steel Co.* v. *Railroad Supply Co.*:[1]

> "This doctrine of *res judicata* is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts to

[1] 244 U. S. 294, at p. 299.

the end that rights once established by the final judgment of a court of competent jurisdiction shall be recognized by those who are bound by it in every way, wherever the judgment is entitled to respect."

In *Marin* v. *Augedahl*,[1] the principle, to which we have addressed ourselves, was applied in favor of a Receiver. While it is true that the "full faith and credit" clause was involved, there is no difference in principle. Minnesota had a law placing a so-called double liability upon stockholders of a certain class of Minnesota corporations and excepting certain other classes. A money judgment was obtained against a corporation of that State and the execution thereon returned unsatisfied. In a proceeding under the Minnesota statute the Receiver of the insolvent corporation brought an action against the stockholders of that corporation and pro rata assessment was made against the stockholders, whether parties to the suit or not, on the ground that the corporation was not in the "excepted" class, described in the statute. Augedahl was a stockholder but was not a named party to the Receiver's suit and did not appear therein. Later the Receiver sued him in North Dakota, where he lived, and the North Dakota Court held that he was not bound by the Minnesota judgment, but could try over again the question of the liability of the corporation. In error to the North Dakota Court, this Court reversed the judgment, saying in part:

[1] 247 U. S. 142, at p. 150.

"In *Hawkins* v. *Glenn*, 131 U. S. 319, an assessment ordered by a Virginia court having the corporation before it was sustained as against stockholders residing in another State and not personally brought into the suit, the ground of decision being that 'a stockholder is so far an integral part of the corporation that, in the view of the law, he is privy to the proceedings touching the body of which he is a member.'"

Again, at page 148:

"Had the Minnesota court in this instance held that the corporation was in the excepted class and then denied the receiver's petition, is it not certain that the order, if neither vacated nor reversed, would have settled conclusively the non-existence of the asserted liability? And if in a subsequent suit the receiver or the creditor represented by him had again asserted such a liability on the part of the stockholders, is there any doubt that the latter could have relied safely on the order as a prior adjudication in their favor? The answers seem obvious. Charged with the duty, as the court was, of ascertaining whether there was any liability to be enforced, it was its province to consider and decide every question which was an element in that problem, including the one of whether the corporation was in the excepted class."

The same rule of *res judicata* has been applied in a number of cases from Kentucky, where the overwhelming majority of purchases of Banco stock were made.

In *Ewald's Executor and Trustee* v. *City of Louisville*,[1] the question arose in this way:

Kentucky had a law exempting the stockholders of a Kentucky corporation from payment of taxes on the value of its capital stock owned by them where the corporation itself paid taxes on all of its property in Kentucky. Under an omitted property assessment statute, suit had been brought by the Commonwealth of Kentucky against the Ewald Iron Company, to which its stockholders were not parties, and an assessment ordered, the judgment reciting that the property so assessed was all the property of the corporation theretofore omitted by it from the tax returns for the years in question.

There was also a rule of law prevailing in Kentucky, stated as follows by the Court of Appeals of Kentucky in its opinion in the *Ewald Case, supra*:

> "We have repeatedly held that the omission of property from an assessment in a given year gives rise to only a single cause of action, and where an action has been brought to have property assessed and a judgment has been rendered therein, the judgment is conclusive, and an action cannot afterwards be brought to assess other property omitted from the same assessment which was not embraced in the first action." (Citing cases.)

Later a new suit was brought by the City of Louisville against the principal stockholder of the Ewald Iron Company on the ground that taxes had not been paid by the corporation on all of its property in Ken-

[1] 192 Ky. 279, p. 282; 232 S. W. 388.

tucky, and that consequently the stockholder was liable for taxes on the shares of the corporation held by him.

The defendant pleaded that, as stockholder of the Company, he was privy to the former judgment against the Company and that the judgment was *res judicata* under the rule hereinabove quoted.

In sustaining that plea and reversing the judgment against the stockholder, the Court of Appeals of Kentucky said:[1]

> "Under the rule of *res judicata*, a right, question or fact, distinctly put in issue and directly determined by a court of competent jurisdiction, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, question or fact, once so determined, must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. Stone v. Winn, 165 Ky. 9, 176 S. W. 933; Southern Pacific v. U. S., 168 U. S. 1, 42 L. Ed. 355. As neither Ewald nor the city was a party to the suits in which the judgments were rendered, the conclusiveness of the judgments depends on whether or not they were privies. Privity may arise by representation. Thus, a judgment against a corporation is conclusive against its stockholders in an action to enforce their statutory liability to creditors; and it is also held that a judgment in a garnishment proceeding against a corporation is conclusive in an action against stockholders to reach assets wrongfully withdrawn, as to the fact of indebted-

[1] 192 Ky. 279, pp. 282-3.

ness to the principal debtor and the amount thereof."

Again, at page 284:

> "For a like reason it would seem that a judgment against a corporation for omitted taxes is conclusive on the stockholder in a subsequent action to collect taxes on his individual stock, where his liability depends on whether or not the corporation has paid taxes on all of its property."

In view of the well established principles evidenced by the foregoing authorities, we submit that the decision in the *Laurent Case* is conclusive of the issue here presented and that Banco and not the respondents must be held to have been the real and true owner of the Bank stock, and not the agent or instrumentality of its stockholders for any purposes.

ELECTION.

In addition to our claim that *Laurent* v. *Anderson*[1] is *res judicata* between the parties here and therefore supports the judgment below and requires its affirmance, *Laurent* v. *Anderson* has another aspect that reaches the same end.

By bringing the suit of *Laurent* v. *Anderson* and claiming that BancoKentucky Company was the true owner of the Bank shares here involved and pursuing that claim to a successful judgment, petitioner has elected as to the ownership of Bank shares and is bound by that election.

[1] 70 Fed. (2d) 819.

Respondents contend that the Receiver of the National Bank of Kentucky can not maintain this suit to hold them as the "actual owners" of the capital stock of the National Bank of Kentucky, for the very simple reason that he has heretofore secured a judgment from this same Court holding that the BancoKentucky Company was the "actual owner" of these same shares.

He cannot after this in a new suit against a different person now ask this Court to adjudge that some one else is the "actual owner" of these same shares.

Well-settled legal doctrines prevent the Receiver from doing this.

In *Davis* v. *Wakelee*[1] this Court said:

> "It may be laid down as a general proposition that, where a party *assumes a certain position in a legal proceeding, and succeeds in maintaining that position,* he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." * * *

Neither BancoKentucky Company, nor its stockholders held any certificates of the capital stock of the National Bank of Kentucky, and neither appeared upon the Record Book required to be kept by Section 62, Title 12, Banks and Banking, U. S. C., showing the names of the stockholders.

Presented with this situation, the Receiver conceivably had the right to choose between Banco and its stockholders the one he deemed to be the true owners

[1] 156 U. S. 680, at p. 689.

of the Bank stock and sue such company or persons and claim that such corporation or such persons were the true owners.

In this case either Banco was or the stockholders were.

In the absence of a claim of joint beneficial ownership, both could not be the actual owners.

Of course, the burden was on the Receiver to show who was the true owner and, therefore, since Banco unquestionably owned the T.P.C.'s, his obvious and less difficult course was to pursue Banco as the true owner.

His course was more difficult if he sued the stockholders, for in that case it was necessary for him to prove that Banco was the character of corporation whose corporate entity could be disregarded before liability could be imposed upon the stockholders.

But the Receiver was likewise charged with knowledge that he could not allege and prove that Banco was the true owner of the stock and succeed in maintaining that position and then in a subsequent suit ask the Court to adjudge just the contrary and fasten liability on some one else.

The law forbids such trifling with the Courts.

With this situation before him and with full knowledge, the Receiver elected to file an action against the BancoKentucky Company.

(The proceedings in the Laurent Case, including petitioner's application for leave to file his action, the pleadings, the arguments, the findings of the District Court and the opinions of the District Court

and the Circuit Court of Appeals in that case have been analyzed in detail (*supra*, pp. 66-70) and that analysis need not be repeated here.)

In 20 *Corpus Juris*, page 17, the rule we contend for is thus stated:

> "Where a party has grounds to bring separate actions against different persons, and the maintenance of one necessitates the allegation of a fact, or the assumption of a position, inconsistent with, or repugnant to, the maintenance of another, he is bound by his election, and cannot proceed against the other." * * *

Election and estoppel are not the same. Election must not be confused with estoppel. The distinction is clearly stated by the Circuit Court of Appeals for the Seventh Circuit in *Barrell* v. *Newby*.[1]

> "Plaintiffs urge that, inasmuch as the answer fails to aver that defendant settled with Todd before they sued defendant, it would be no hardship to require defendant to pay them. *It seems to us that plaintiffs are confusing election with equitable estoppel.* Election, whether of remedies or of defendants, has no regard to the situation of the defendant, but *is founded on a public policy that forbids a plaintiff to trifle with the Courts.* Equitable estoppel, on the other hand, grows out of a consideration of the defendant's state. They are distinct defenses, and he who *pleads election* need not show that it would be inequitable to permit the plaintiff to recover; it is enough if he

[1] 127 Fed. 656 at pp. 661 and 662.

shows that the plaintiff, having by law the right to take either of two courses, has taken and holds to the one that leads away from him."

In the case of *Berry v. Chase* (C. C. A., 6th), Judge Lurton stated the law of elections thus.[1]

"* * * But the law is that, when there is an undisclosed principal behind, he may be made liable, although he was never given credit by the seller, provided the circumstances are not such as to make such a result unjust or inequitable. But one who has dealt with an agent cannot upon discovery of an undisclosed principal hold both the agent and the principal liable. *He must choose between the two, and an election once made he must abide by it.*"

In *Pottorf v. Dean*,[2] the Circuit Court of Appeals for the First Circuit had before it a national bank assessment case, wherein a claim of election by the receiver was made and the Court held that such election was binding in a second suit by the receiver involving a portion of the same stock. Suit was filed by the Receiver of the First National Bank of El Paso against Mrs. Dean to recover the assessment. She had transferred 571 shares of stock of the El Paso Bank and 31 shares of stock of the First National Bank of Albuquerque to trustees for the benefit of her minor children. The trust was without reservation. Both banks were solvent at the time of the transfer. At the time of the appointment of the receiver for the

[1] 146 Fed. 625, at p. 626.
[2] 77 Fed. (2d) 893.

El Paso Bank the 31 shares of the Albuquerque Bank were the only assets in the hands of the trustees for the children other than the shares of the El Paso Bank. It was claimed that the transfer being to minors was unavailable as a defense to Mrs. Dean.

The receiver first notified the trustees of their liability for the stock assessment. The trustees admitted the liability and forwarded the 31 shares of stock of the Albuquerque Bank in discharge of their liability. The receiver, to avoid a possible liability in case of insolvency of the Albuquerque Bank, requested that he might hold it as collateral until sold. The Court said:[1]

> "* * * Having accepted it on that basis, and having sold the stock, the receiver is bound by it. He cannot hold both the trustees and Mrs. Dean. The two propositions are inconsistent. He has made his election to hold the trustees on the ground that there was a bona fide transfer to the trustees and that the trust estate was liable under Section 66, 12 U. S. C. A."

Barrell v. *Newby*,[2] decided by the Circuit Court of Appeals for the Seventh Circuit, was a case similar to *Berry* v. *Chase, supra.* This was a suit by a New York broker against Newby, who had directed Todd, an Indianapolis broker, to sell 100 shares of Northern Pacific stock "short." Todd, the broker, had actually directed the plaintiff to sell the shares. The New York broker lost a large sum in attempt-

[1] 77 Fed. (2d) 893, at p. 896.
[2] 127 Fed. 656.

ing to protect himself on the transaction. After the transaction was complete, Todd notified plaintiff that he was acting as agent for Newby. This notice was received prior to any action by the plaintiff against either Todd or Newby. After getting such notice, the New York brokers applied on account of their loss $5,734.74 then in their hands belonging to Todd and thereafter continued to hold this money. They also instituted suit against Todd.

Newby claimed that the application of this money of Todd's and the suit against Todd was an election and prevented suit against him even though the original claim was unsatisfied.

In deciding that the suit could not be maintained, the Circuit Court of Appeals for the 7th Circuit said:[1]

> "Do plaintiffs' acts constitute an election? In two instances plaintiffs procured conditional executions in advance on their solemn declaration to the courts that the broken contract was Todd's—not Todd's and the defendant's, but Todd's. In another instance plaintiffs acted as court and sheriff, and turned Todd's money into their own till. Now they declared with equal solemnity that the same broken contract was defendant's—not defendant's and Todd's but defendant's. We do not mean to assert that the mere bringing of an action against Todd would be inconsistent with their proceeding later against defendant. If the action were begun before they learned of defendant's principalship, certainly they should be permitted to dismiss, and sue defendant. And if they proceeded against Todd by reason of mistake

[1] 127 Fed. 656, at p. 661.

or fraud or the like, they might seek relief from their act, give up the chase they had entered upon, and return to the cross-roads. But here, under no misapprehension of comparative standings, but with full knowledge of the whole truth of the situation, plaintiffs not merely seized Todd's money on the basis that the contract was his, but they insist upon their right to retain it, and to say that the contract is Todd's throughout the time in which they assert that the contract is defendant's. To our minds but one interpretation can be given to this conduct."

The Circuit Court of Appeals, for the Second Circuit, in *Johnson & Higgins* v. *Charles F. Garrigues Company*,[1] made and applied the same proposition of law herein contended for. The following excerpt from the opinion covers the situation:

"The appellant Norwegian Nitrogen Products Company, Inc., was clearly established to have been the principal for the purchase of its casks through the Charles F. Garrigues Company, its agent. *This relationship was well known to the appeellee when, on December 31, 1926, it took a decree* [against the agent] *reserving the right to proceed against the Norwegian Nitrogen Products Company, Inc., but not electing to hold them alone. It was impossible, in legal contemplation, to hold the agent and the Norwegian Company.* The Jungshoved (C. C. A.), 290 F. 753; Barrell v. Newby (C. C. A.), 127 F. 656; Berry v. Chase (C. C. A.), 146 F. 625; Georgi v. Texas Co., 225 N. Y. 410, 122 N. E. 238. Because the appellee sued the agent to judgment after a disclosure of the facts as

[1]30 Fed. (2d) 251, at p. 253.

stated, we must regard that as an election upon its part to hold the agent liable, and to discharge the principal, Norwegian Nitrogen Products Co., Inc."

In the case of *Pittsburgh Terminal Coal Corporation* v. *Bennett*,[1] the Circuit Court of Appeals for the Third Circuit announced the same principle in the following language:

> "It is a general rule of law which is well settled by a long line of decisions that, if a person contracts with an agent of an undisclosed principal, upon discovery of the principal, he has a right of action against the agent and a corresponding right against the principal. He may elect to proceed against either, but he may not proceed against both. If he elects to proceed against the agent after he discovers the identity of the principal, he may not thereafter proceed against the principal. If judgment is taken against either with full knowledge of all the facts, no claim thereafter may be asserted against the other, even though the judgment is unsatisfied. Williston on Contracts, Vol. 1, Sec. 289; Barrell v. Newby, 127 F. 656 (C. C. A. 7); Johnson & Higgins v. Charles F. Garrigues Co., 30 F. (2d) 251 (C. C. A. 2)."

The case just above referred to is cited by the Circuit Court of Appeals, for the Tenth Circuit, in *Queenan* v. *Mays*,[2] decided May 28th, 1937: The facts of the *Queenan Case* were these:

[1] 73 Fed. (2d) 387, at p. 389.
[2] 90 Fed. (2d) 525.

Joseph Mays had deposited with the First National Bank of Bristow, for safe-keeping, Liberty Bonds of the face value of $39,000. Without the knowledge or consent of Mays, the bank pledged these bonds to Creek County, Oklahoma, to secure a county deposit. Later Mays brought a replevin action against the county to recover the bonds. Neither the bank nor its receiver was a party to that action. Mays was defeated, the Court holding that the county was a bona fide purchaser, for value, from the bank. The bank failed. Thereafter, Mays sued the receiver of the bank to recover the value of his bonds that the bank had converted.

On motion of the receiver, the county was made a party, and he sought to recover the Mays' bonds from the county.

The county, shifting its position from that taken by it in the suit Mays had brought against it, defended on the ground that the bonds were Mays.

Responding to this claim, the Court said:[1]

> * * * "Mays sued the county. To defeat Mays the county established the fact that it believed them to be the property of the bank, and accepted them as such.
>
> "The receiver now sues. To defeat this action, the county now takes a position directly contrary to that it successfully took to defeat Mays, to wit, that the bonds were not the property of the bank but the property of Mays. If the argument is sound, then we have this situation: The county is not entitled to keep the bonds if they belong to

[1] 90 Fed. (2d) 525, at p. 533.

the bank under the Sneeden Case, nor if they belong to Mays because they were pledged without his knowledge; yet it may keep them by alleging in the state court they took them as the property of the bank and in this Court that they were pledged as the property of Mays. We cannot lend our assent to an argument leading to such an anomalous result. The bonds belonged either to Mays or the bank, and the county is not entitled to retain them in either case. The apposite principle of law is laid down in Davis v. Wakelee, 156 U. S. 680, 689, 15 S. Ct. 555, 558, 39 L. Ed. 578, as follows:

" 'It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.' "

Myers v. *Ross,*[1] although not involving an assessment, is quite similar to the situation presented here.

The First National Bank of Jasper, Florida, had failed. Max Myers owed the bank $2,400.00 on a note. Max Myers and his wife were in business together. Myers had deposited $8,000 in the bank, for which a certificate of deposit was issued in favor of Mrs. Myers. After the failure of the bank Mrs. Myers disclaimed any interest in the certificate of deposit and Myers claimed the certificate of deposit and wished to have a proportionate part set off against his note. This the

[1] 10 Fed. Supp., 409, at p. 411.

receiver refused to do and sued Myers. In the suit Myers claimed the certificate of deposit and asserted this as a set-off. Judgment went against Myers. Thereafter the bank paid a dividend. Not having satisfied his judgment against Myers, the receiver applied this dividend on his judgment. Whereupon Mrs. Myers sued the receiver and claimed that the receiver could not claim the money was Myers' in view of his refusal to accept her disclaimer in the first instance. In holding that the receiver's election bound him, the Court stated:

> "But the receiver, with full knowledge of all the facts, has made an election with respect to the title to the deposit, and consequently its avails which are the subject-matter of this suit, and has prosecuted that election successfully."

Again:

> "The doctrine of election differs from estoppel in the broader sense of the latter, in that the party invoking a prior election need not show that he will suffer material disadvantage unless his adversary is compelled to abide by his former election, nor is it necessary that the former election shall have been acted upon by the other party to his prejudice. Estoppel depends upon what a party causes his adversary to do. Waiver by election depends upon what the party himself intends to do, and has done. Flynn-Harris-Bullard Co. v. Hampton, 70 Fla. 231, 70 So. 385; 20 C. J. 4, 17.
>
> "A party cannot, either in the course of litigation, or in dealings, *in pais*, occupy inconsistent positions. Where he has an election between two

or more inconsistent courses, and has knowledge of all the facts, he will be confined to that which he first adopts. Such election, knowingly made, cannot be withdrawn even though it has not been acted upon by another to his prejudice."

In a decision of the Circuit Court of Appeals, for the Sixth Circuit, in *United States* v. *Brown,*[1] decided December 15, 1936, the same rule was applied against the United States Government. This case held the Commissioner of Internal Revenue, acting for the Government, had elected which one of two different persons he would pursue to judgment and having so elected the United States was bound.

The question in that case was presented in this way. The Big Springs Distilling Company ceased business and distributed its assets among its stockholders. At that time the corporation owed the Government taxes for 1918, 1919, 1920 and 1921. The Government made an income tax assessment against the individual stockholders based on the full amount distributed to them. The stockholders claimed their assessment for income tax should be reduced by their pro rata liability for the unpaid taxes of the corporation. The Government denied this claim and secured a judgment based on the full amount distributed to the stockholders. Later the Government sought by suit to impress the property received by the stockholders from the corporation with a trust for the amount of the unpaid corporation tax. In affirming the decree against the Government, the Court said:[2]

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[1] 86 Fed. (2d) 798.
[2] 86 Fed. (2d) 798, at p. 799.

"* * * The Commissioner exercised a freedom of choice. He chose to press the tax appeal proceedings, and this unequivocally constituted an election. *Cf.* Robb v. Vos, 155 U. S. 13, 43, 15 S. Ct. 4, 39 L. Ed. 52. So far as the corporation taxes were concerned, the Government could avail itself of one of two remedies. The same amounts could not at once constitute income to the taxpayers and also be charged with a trust in favor of the Government. The Government could bring the transferee action on the theory of trust, or in the alternative, it could claim that all of the liquidating dividends constituted personal income to the taxpayers. It could not pursue both courses. It deliberately chose that the instant case should slumber in the files, and pressed the personal assessment on the theory that the entire respective amounts of liquidating dividends constituted income. The Government is bound by its election. United States v. Oregon Lumber Co., 260 U. S. 290, 301, 43 S. Ct. 100, 67 L. Ed. 261."

The rule laid down in these cases is clear. It has been constantly applied by the Courts and has a sound basis both in practice and logic.

Petitioner seeks to avoid the effect of the doctrine of election, because he sent a letter to the stockholders of the BancoKentucky Company calling attention to what he was doing in the suit against the BancoKentucky Company. It would seem clear that his letters to the respondents could not have this effect. Having no right to obtain a judgment against both the BancoKentucky Company and the respondents, as true owners of the same Trustees' Participation Certificates,

petitioner could not avoid the effect of the doctrine of election by this simple device. He could not seek successive judgments, each holding that the person sued was the true owner of the stock involved. If he could, the wholesome doctrine meant for the protection of the courts could be frittered away.

We submit that the petitioner's election to sue the BancoKentucky Company and obtain a judgment against that company as the *true owner of the Trustees' Participating Certificates here involved* was not only in accord with the facts, but it was also an election and prevents him from maintaining a suit against the appellees here. The rule we ask to be applied, as stated by the Seventh Circuit in *Barrell* v. *Newby, supra*—

> * * * *"is founded on a public policy that forbids the plaintiff to trifle with the courts"*

and has been many times upheld.

THE DECISION IN ATHERTON v. ANDERSON IS CONCLUSIVE AGAINST ANY CLAIM THAT MAY NOW BE MADE THAT THE BANK WAS INSOLVENT OR THAT FAILURE WAS IMPENDING WHEN BANCO WAS ORGANIZED AND ALSO AGAINST ANY CLAIM THAT BANCO WAS THE CHARACTER OF CORPORATION THE ENTITY OF WHICH MAY BE DISREGARDED, AS TO ALL RESPONDENTS WHO WERE PARTIES TO THAT ACTION.

A number of the respondents here were directors of the National Bank of Kentucky. Each was the owner of ten shares of stock of the Bank. The assessment upon their ten shares each is not involved in this case. In addition, however, to the ownership of ten shares of Bank stock, practically all of them transferred their Trustee Participation Certificates to the BancoKentucky Company and, in addition, they, the directors (as a whole), purchased approximately $1,-180,000 of Banco stock for cash.[1]

After the Bank closed, Paul C. Keyes, as Receiver of the National Bank of Kentucky, sued the directors of the Bank, seeking recovery against them for two items (among others):

I. On account of petitioner's claim that they had knowingly participated in declaring illegal dividends of $2,240,000. This amount included annual quarterly dividends, beginning July 1, 1927, and ending October 1, 1930, the last divi-

[1]Transcript of Record, Vol. III, Finding 28, p. 256.

dend being over a year after respondents had sold their Trustees' Participation Certificates to BancoKentucky Company.

and

II. That they were liable for participating in the making of large loans, collateraled "in whole or in part" by BancoKentucky Company stock, contrary to the statute. This claim was based on the same idea that is involved here, that Bank stock being involved, the corporate entity could be looked through for the purpose of ascertaining whether Bank stock formed "in whole or in part" collateral on the loan.

The Court decided that all of the dividends were properly declared, thus leaving the Bank, after their payment, with something more than $4,000,000 capital and $2,000,000 surplus, as of each dividend period.

As to the Banco loans, the Master decided and the Circuit Court of Appeals decided that the challenged loans were all properly made and held that Banco was not the character of corporation whose corporate entity could be disregarded.

As to the directors, who are respondents here, these decisions are pleaded[1] as *res judicata* of the fact (1) that the Bank was solvent at the time Banco was organized and at least until October 1, 1930, more than a year thereafter, and (2) that the corporate veil of Banco can not be lifted in order to see that Banco owned Bank stock.

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[1]Transcript of Record, Vol. I, pp. 122 and 138.

We will discuss these two findings in the order named.

I

Under the Banking Act dividends must be paid out of undivided profits only.

Revised Statutes, Section 5204, 12 U. S. C. §56, provides as follows:

> "No association, or any member thereof, shall during the time it shall continue its banking operations, withdraw, or permit to be withdrawn, either in the form of dividends or otherwise, any portion of its capital. *If losses have at any time been sustained by any such association, equal to or exceeding its undivided profits then on hand, no dividend shall be made;* and no dividend shall ever be made by any association, while it continues its banking operations, to an amount greater than *its net profits then on hand, deducting its losses and bad debts.*" * * *

In addition to deducting debts that are actually bad, there must also be deducted what are known as statutory bad debts. These statutory bad debts are defined as follows (R. S., Sec. 5204, 12 U. S. C. §56):

> * * * "All debts due to any association, on which interest is past due and unpaid for a period of six months, unless the same are well secured, and in process of collection, shall be considered bad debts within the meaning of this section." * * *

It will be seen from the definition of statutory bad debts that these debts may in fact not be bad at all, but are included because they come within the statutory definition.

The Receiver's claim against the directors for the recovery of illegal dividends required the answer to two questions:

(1) the primary and basic one was whether the capital and surplus of the Bank was impaired by the declared dividend;

and (2) did the directors know of such impairment, if it existed?

If after a full examination of the condition of the Bank, it was found that, after allowance for all debts, liabilities, losses sustained, bad debts, statutory bad debts, plus the amount of the dividend declared, the capital and fixed surplus of the Bank was still whole, the claim of the Receiver automatically failed for *a fortiori*, the directors could have no knowledge of a non-existent fact.

The situation here is identical in that the Receiver now seems to base his whole case upon the assumption that there was impending insolvency at the time of the formation of Banco.

If the Bank were not facing impending insolvency, it is hard to see the relevancy of any of the arguments which the Receiver here makes. Certainly the greater part of his brief is of no moment whatever in determining the correctness of the decisions below.

The Bank had a capital of \$4,000,000 and a fixed surplus of \$2,000,000 throughout the period involved.

In the case of Keyes v. Akers (later known as Atherton v. Anderson) the Receiver offered a great deal of testimony in support of his claim. The evidence included all the National Bank Examiners' reports covering the period and all the other Bank data he thought pertinent.

He introduced many witnesses, including an expert accountant connected with Lybrand, Ross Bros. & Montgomery, of Chicago, and the two Chief National Bank Examiners for this District during the period involved, John S. Wood and Robert Neill. He also introduced Clarence M. Stewart, of the Federal Reserve Bank, through whom there was filed in evidence a great deal of correspondence relative to the possible denationalization of the Bank of Kentucky and referred to in petitioner's brief.

Of course, these witnesses were cross-examined fully by defendants.

The defendants also introduced their own testimony.

The case was then fully briefed before the Master.

The Master held that the Bank's capital and fixed surplus were not invaded by the declaration of any dividend.[1]

Exceptions were filed to this report by the petitioner and the question was elaborately briefed and argued with the result that the Master's ruling was sustained by the District Court, the Opinion reading as follows:[2]

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[1]Defendants' Exhibit No. 1, Rec. Atherton v. Anderson. Vol. I, pages 443 etc.

[2]Opinion in Anderson v. Akers, 7th Fed. Supp., page 924, at page 958.

"The Master disallowed this claim in its entirety, finding that the evidence failed to show any facts indicating any statutory violation by any of the directors or any negligence on their part in connection with these dividends. The Master discussed and analyzed, at great length and in much detail, numerous debts which the plaintiff claims should have been charged off as statutory bad debts, and after painstaking and thorough consideration of such debts and of the other relevant facts and circumstances the Master found that the evidence did not sustain this claim of the plaintiff. To recite or review these details would unduly prolong this opinion and would serve no useful purpose. *It is sufficient to say that the findings of the Master are convincingly supported by the record.* It is entirely clear, and I find, that the witnesses on whom the plaintiff relied in this connection had no personal knowledge of the facts concerning which they assumed to testify. *There is no competent evidence sufficient to sustain the burden resting on the plaintiff of proving that any of these dividends were paid out of capital of the bank or were not paid out of its net profits after deducting therefrom its losses and bad debts, including all debts on which interest was past due and unpaid for a period of six months and which were not well secured and all debts in process of collection.*"

The effect of this opinion was carried into the judgment. There was no appeal from this finding by the Receiver. It was not before the Court of Appeals, and time for an appeal has long since expired.

This decision in the suit between petitioner and respondents, who were also directors of the National

Bank of Kentucky, is certainly conclusive of the fact that the Bank was solvent in September, 1929, and through October 1, 1930, when the last dividend was paid.

If the National Bank of Kentucky on October 1, 1929, contemporaneously with the transfer of the Trustees' Participation Certificates, and at every quarter thereafter, including October 1, 1930, had an intact capital of $4,000,000 and an intact surplus of $2,000,000 and was able in addition to pay a dividend of $160,000 after deduction of all bad debts and statutory bad debts, it seems perfectly clear that there was no impending insolvency of the Bank as of the time of the transfers.

II.

It was claimed by the Receiver of the National Bank of Kentucky in Atherton v. Anderson that the defendant directors were liable for loans made by the Bank on the security, in whole or in part, of Banco stock, because of the fact that Banco owned Trustees' Participation Certificates, which were claimed to represent Bank stock.

The defendants there, who are also respondents here, took the position that the shares of stock of the corporation did not represent an interest in its assets, that the corporate entity made it impossible to attribute an interest in the corporation's property to its members, and for that reason the corporate personality could not be ignored.

The Master held that the normal rule prevailed and that Banco was a bona fide corporation and that its stock was not Bank stock and the mere fact that Banco owned Bank stock did not change the general rule.

The District Court reversed this finding, but the Circuit Court of Appeals, 86 Fed. (2d) 518, 536, held as follows:

> * * * "It (Banco) was organized for clearly defined purposes, too optimistically conceived, perhaps, but neither illegitimate nor unlawful. *It had its own capital with cash resources at one period almost twice the entire capital and surplus of the bank.* While in the very beginning the bank stock may, as found by the court, have been its principal asset, and may have continued thereafter to be its most valuable single asset, it had other assets of very substantial value, and it was warrantable inference at the time of its organization and for a substantial period thereafter that it could well meet any assessment that might be levied upon it as a stockholder of the bank. At any rate there is nothing in the record to point to its creation for the purpose of escaping such assessment. *Indeed when the assessment was finally made by the Comptroller it was enforced against Banco and not against the stockholders.* See *Laurent* v. *Anderson, supra.* Its separate corporate existence was recognized by the very receiver on whose behalf we are now asked to ignore it."

Again (p. 536):

> "The circumstances under which one corporation will be held to be but the *alter ego* of another

were recently fully considered by us in *Shepherd, Trustee,* v. *Banking & Trust Co.,* 79 Fed. (2d) 767, 769. We there approved the doctrine of *Pittsburgh & Buffalo Co.* v. *Duncan,* 232 Fed. 584, 587 (C. C. A. 6), to the effect that: 'The mere fact that the stockholders in two or more corporations are the same, or that one corporation exercises a control over the other through ownership of its stock, or through identity of its stockholders, does not make either the agent of the other, nor does it merge them into one * * * where each corporation is separately organized under a distinct charter' and likewise gave approval to the exception to this general rule announced in *New York Trust Co.* v. *Carpenter,* 250 Fed. 668, 672 (C. C. A. 6), and approved in *Hooper-Mankin Co.* v. *Mathew Addy Co.,* 4 Fed. (2d) 187, 189 (C. C. A. 6), where it was said:

> " 'From an examination of many decisions, we venture to say that no corporation acting within its powers has been held liable for the debts of another corporation legally organized, because it controls such corporation by reason of ownership of its stock, or otherwise, except by reason of contract or on grounds of agency, or of estoppel, or because the controlled corporation has been used in such a way that the maintenance of its character as a separate and distinct entity would work injustice.'

"The principle has been affirmatively stated in the Ninth Circuit (*Martin* v. *Development Co. of America,* 240 Fed. 42) thus: 'A holding corporation has a separate existence and is to be treated as a separate entity, unless facts are averred which show that such separate corporate existence is a

mere sham, or has been used as an instrument for concealing the truth, or where the organization and control are shown to be such that it is but an instrumentality of another corporation.'

"The BancoKentucky Company was certainly not a sham, for *nearly ten million dollars of actual cash paid for its stock attest its reality,* and there is nothing in the record to point to it as an instrumentality of the bank. Nor was it organized for a fraudulent purpose or to conceal secret or sinister enterprises conducted for the benefit of the bank. The master absolved the appellants of all suspicion of bad faith and the court approved his finding in the last of three carefully reasoned opinions (11 Fed. Supp. 9, 14). Certainly we must accept this as the deliberate judgment of the court rather than as a euphemism, easing the blow to the sensibilities as it fell heavily upon the purse."

Following this decision and after the case had reached this Court upon a different point, judgment was rendered on the question here involved on December 28, 1938, as follows:

"It is adjudged that none of the non-officer directors of the National Bank of Kentucky of Louisville are liable to the plaintiff under Section 93 of Chapter 2 of the title, Banks and Banking of the United States Code, or on common law principles of negligence for the losses sustained by the Bank on account of moneys supplied on loans collateraled, in whole or in part, by stock of the BancoKentucky Company and set out in Paragraph 45 of the original decree herein."

This Court, in *Southern Pacific Railroad* v. *United States*,[1] and other cases, has adhered to the following principle:

> "The general principle announced in numerous cases is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and *even if the second suit is for a different cause of action, the right, question or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains unmodified.* This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue and actually determined by them."

The same rule prevails in Kentucky. In the case of *Brooks* v. *Lower Elkhorn Coal Corporation*,[2] the following rule was applied by the Court of Appeals:

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[1] 168 U. S. 1, at pp. 48-9.

(This ruling has been a number of times followed by the Supreme Court and in an opinion written by Justice Roberts was re-stated in Tait v. Western Maryland Railway Co., 289 U. S. 620, at p. 623.)

[2] 219 Ky. 74, at pp. 77-8.

* * * "In Moore v. Gas & Electric Shop, 216 Ky. 530, 287 S. W. 979, we laid down the rule that when a right or fact has been judicially tried and determined by a court of competent jurisdiction, the judgment of the court so long as it remains unreversed is conclusive upon the parties and those in privity with them in law or estate, and that where some controlling fact or question material to the determination of an action has been determined in a former suit and the same fact or question is again at issue between the same parties, its adjudication in the first will, if properly presented, be conclusive of the same question in the latter suit *without regard to whether the cause of action is the same or not, or whether the second suit involves the same or a different subject-matter.*"

Certainly, as to those of the respondents, who were Bank directors and parties to the suit in *Atherton* v. *Anderson*,[1] any claim that the Bank was insolvent, or approaching insolvency, as of the time of the formation of Banco, or that the corporate entity should be ignored, is *res judicata* here.

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[1] 86 Fed. (2d) 518.

PETITIONER'S BRIEF.

The larger portion of the foregoing brief was written before receipt of petitioner's brief, copy of which we received on Saturday, January 16, 1943.

In the reflected light of the contentions made by the Receiver in the courts below, his brief in this Court, shows him ~~in a~~ new role. In the last analysis, his present position is that stockholders of a national bank who, prior to the repeal of Section 64, Title 12, U. S. C., transferred their bank shares to a bank stock holding corporation in exchange for shares of that corporation, are not relieved from the double liability imposed by that section of the Bank Act, so long as they retained the shares of the corporation to which their bank shares were transferred, and that Banco was a corporation of that type.

It is true that the Receiver still flies the tattered remnants of the flags under which he sometimes fought in the District Court and in the Circuit Court of Appeals.

He still features the reports of the bank examiners who examined the National Bank of Kentucky repeatedly from April 23, 1927, to November, 1930, when the Bank closed, insisting that these reports showed that the Bank was in an "unhealthy" or "precarious" condition during that whole period (Brief, pp. 7-35, inclusive). By far the larger portion of his brief is devoted to this subject. And he emphasizes the importance of this element of the case in his statement of the issue (Brief, p. 5) as involving only transfers made by stock-

holders *"of an insolvent national bank."* But, as we have heretofore shown, his bill of complaint contains no allegation that the stockholders of the Bank, when they transferred their Participation Certificates to the BancoKentucky Company, had any knowledge of a condition in the Bank that would suggest the idea that a failure of the Bank to meet its obligations was impending. It is true that in his brief (p. 24) he makes an oblique reference to knowledge on the part of the directors of the Bank, saying that it was their duty to know the "precarious" condition of the Bank, even if they did not know it actually, and, in the next following paragraph, he lumps the officers, directors and stockholders together in making the statement that they had agreed to organize a holding company, "knowing the precarious condition" of the Bank. Again (p. 39), in referring to the provision in the articles of Banco and on its stock certificates that its stock was "fully paid and non-assessable," he asks the following rhetorical question: "What did they intend by this except to escape the assessment liability?" The provision that stock is "fully paid and non-assessable" could not possibly be considered as relating to a double liability assessment. In common practice, it means only that it is not subject to further calls for payment by the issuing company.

We have also shown that petitioner has heretofore, *in this case,* disclaimed any assertion that the Bank was insolvent, in any sense of the word, or that these respondents knew it. Even in his present brief, petitioner says (p. 60):

"Liability does not depend upon pending insolvency."

If pending insolvency, or the condition of the Bank, is not a material element of liability, must we not assume that the large part of the brief devoted to this subject was merely for the purpose of beclouding the true issue and to create an unfavorable impression in the mind of the Court as to the position of the respondents? In any event, since it is again affirmed that impending insolvency is not an issue in the case, we forbear from further lengthening this brief with an examination of petitioner's factual statements in regard to the Bank's condition, and it must be assumed that the findings of both courts below as to this issue (*supra*, p. 56) were correct and will not be disturbed.

The Receiver still clings, somewhat precariously, to the charge that respondents must be considered as the real owners of the Bank stock, either because Banco was organized merely as an agency or instrumentality of its stockholders, or because of faint intimations of some clandestine purpose in its organization, or for no better reason than that Banco continued to hold T.P.C.'s representing Bank stock among its assets. These claims presented merely factual issues and petitioner was unable to sustain any of them by proof either in the District Court or in the Circuit Court of Appeals. In the earlier part of this brief we have given at some length a complete history of the organization of Banco as shown by the record in this case. We have also referred to the cases upon which peti-

tioner relies in his brief. Those discussions need not be repeated here.

The question of the real ownership of the Bank shares by Banco, involving as it does every ground which might be urged in favor of finding such ownership elsewhere, has been before the Circuit Court of Appeals on three separate occasions (*Laurent* v. *Anderson*, 70 Fed. (2d) 819; *Atherton* v. *Anderson*, 86 Fed. (2d) 518, and *Anderson* v. *Abbott*, 127 Fed. (2d) 696). On each and every one of those occasions it has been held that Banco, and not its stockholders, was the real owner of the Bank shares, and every reason which could be presented to induce a contrary finding has been rejected. In view of this situation, we deem further discussion of the question at this time to be unnecessary.

It is obvious that this conception of the responsibility of transferrers of Bank shares has no support in the Bank Act itself. That Act, Section 64, imposes a double liability upon transferrers of bank shares only in two instances, (1) where the transfer was made within sixty days next before the failure of the bank, or (2) where the transfer was made "with knowledge of such impending failure," that is, the failure of the bank "to meet its obligations."

Petitioner's brief complains of the finding of the District Court that Banco was an "operating" company and not merely a "holding" company. As we understand petitioner's new theory, this apparently makes no difference. At least, we are given no intimation of what differences must exist between those

corporations that fall within or without the class the stockholders of which petitioner now claims should be subject to such liability.

The District Judge had the benefit of much evidence and testimony beyond that mentioned in petitioner's brief. The Court had a right to consider what was *intended* to be done, as well as what *was* done. The Court realized that a connection with varied banking interests was one of the preliminary essentials to assure Banco a certain and wide source for the initiation of business activities. Such had always been a part of the plan. The Court also knew that, following close on the heels of its organization in July, 1929, came the stock market crash in October of that year, and that this event was a particularly hard blow to the business possibilities of the type which Banco hoped and expected to engage in. And the Court also knew that, in spite of all these difficulties, Banco proceeded to acquire a one-half interest in one of the largest investment houses in the South. The respective securities had actually been exchanged and everything had been done to complete the transaction, except to determine the value of the Caldwell assets. The Court was entitled to give consideration to the testimony of respondents, which was unchallenged, to the effect that they believed Banco was to perform all the functions permitted by its charter and that they expected to have an entirely different form of investment from the mere ownership of bank shares. The Court was not required to gauge the character of Banco merely by a backward look at what had happened in the few months of its

existence. There is no occasion for disturbing this finding, supported as it is by two separate decisions of the Circuit Court of Appeals in the *Atherton Case* and in the instant case. That subject, at least, is entitled to judicial repose.

Petitioner's criticism of the decision by the Circuit Court of Appeals is difficult to understand. Apparently, the chief complaint is that the Court found Banco to be the "true owner" of the Bank shares and that respondents were not such true owners. At least, petitioner now says (p. 60) that liability—

> "arises by virtue of the statute and depends on ownership,"

and argues that respondents had the same property after the transfer as before. This statement, of course, is wide of the mark. Before the transfer they owned a proportionate interest in the Bank. After the transfer they owned a proportionate interest in Banco. After the transfer, as petitioner himself has pointed out (*supra*, p. 35), Banco received dividends on its interest in the Bank stock and could dispose of them as it wished; Banco, and not its stockholders, retained and exercised its right to vote the Bank shares; and to select directors of the Bank. Banco, and not its stockholders, retained and exercised its right to secure title to the stock in the Bank or to dispose thereof. Banco, and not its stockholders, retained every privilege given by the Bank Act to stockholders. Petitioner still insists that respondents hoped and expected to remain

in the banking business—although every item of testimony in the case is to the contrary.

It ill becomes petitioner now to criticize the Circuit Court of Appeals for holding that Banco, and not its stockholders, was the real, true and beneficial owner of the Bank stock, because in the *Laurent Case* this same Receiver, and the same counsel, had labored to induce the Court to adopt that very principle. When it suited the Receiver to call Banco the true owner, he did not hesitate to ask the Court to support him in that position. Later, in the *Atherton Case,* the Court, on another issue, very properly took the same position. Now that it suits the petitioner to take a contrary position, he does not hesitate to criticize the Court for saying again what it had previously said at his insistence. We believe the petitioner has shown no ground upon which the decision of the District Court or the Circuit Court of Appeals should be disturbed.

The assessment here involved gives rise only to "an unsecured and unpreferred claim," entitled to no peculiar dignity or sanctity. The statute giving rise to this assessment has long since been repealed. The District Court and the Circuit Court of Appeals have carefully examined all the facts and have given meticulous attention to every argument made by petitioner in support of his claim. They have held, as a fact, that Banco was the true owner of the Bank stock against which the assessment was levied. Both Courts have examined and distinguished cases claimed to be similar and have rejected their claimed application to this case.

It is respectfully submitted that no reason is here shown for disturbing these findings and opinions and that the decision below should be affirmed.

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January 30, 1943.

APPENDIX.

United States Code, Title 12.

§63. *Individual liability of shareholders.*—The shareholders of every national banking association shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts, and engagements of such association, to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares; except that shareholders of any banking association now existing under State laws, having not less than $5,000,000 of capital actually paid in, and a surplus of 20 per centum on hand, both to be determined by the Comptroller of the Currency, shall be liable only to the amount invested in their shares; and such surplus of 20 per centum shall be kept undiminished, and be in addition to the surplus provided for in this title; and if at any time there is a deficiency in such surplus of 20 per centum, such association shall not pay any dividends to its shareholders until the deficiency is made good; and in case of such deficiency, the Comptroller of the Currency may compel the association to close its business and wind up its affairs under the provisions of chapter four of this title. (R. S., §5151.)

§64. *Transfer of shares.*—The stockholders of every national banking association shall be held individually responsible for all contracts, debts, and engagements of such association, each to the amount of his stock therein, at the par value thereof in addition to the amount invested in such stock. The stockholders in any national banking association who shall have transferred their shares or registered the transfer

thereof within sixty days next before the date of the failure of such association to meet its obligations, or with knowledge of such impending failure, shall be liable to the same extent as if they had made no such transfer, to the extent that the subsequent transferee fails to meet such liability; but this provision shall not be construed to affect in any way any recourse which such shareholders might otherwise have against those in whose names such shares are registered at the time of such failure. (Dec. 23, 1913, c. 6, §23, 38 Stat. 273.)

§64a. *Liability of shareholders after June 16, 1933; termination.*—The additional liability imposed upon shareholders in national banking associations by the provisions of section 5151 of the Revised Statutes, as amended, and section 23 of the Federal Reserve Act, as amended [§§63, 64, this title], shall not apply with respect to shares in any such association issued after the date of enactment of this Act. Such additional liability shall cease on July 1, 1937, with respect to all shares issued by any association which shall be transacting the business of banking on July 1, 1937: Provided, That not less than six months prior to such date, such association shall have caused notice of such prospective termination of liability to be published in a newspaper published in the city, town, or county in which such association is located, and if no newspaper is published in such city, town, or county, then in a newspaper of general circulation therein. If the association fail to give such notice as and when above provided, a termination of such additional liability may thereafter be accomplished as of the date six months [sic] subsequent to publication, in the manner above provided. (June 16, 1933, c. 89, §22, 48 Stat. 189; Aug. 23, 1935, c. 614, Tit. III, §304, 49 Stat. 708.)